Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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LO-JI SALES, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

OPINIONS BELOW

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the New York Court of Appeals entered in the above case on July 5, 1978.

JURISDICTION

The State of New York, County of Orange Local Criminal Court, Town of Wayayanda's judgment and opinion was entered on November 13, 1976. Copy of said opinion is set forth in Appendix A. The

order of the Appellate Term was entered on April 25, 1978. Copy of said opinion is set forth in Appendix B. An application for leave to appeal was timely filed and denied by the New York Court of Appeals on July 5, 1978. Copy of said denial is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28 United States Code 1257(3).

QUESTIONS PRESENTED

1. Does the search of a bookstore and the seizure of 790 copies of books, magazines and films presumptively protected by the First Amendment, conducted and effected prior to the issuance of a warrant which specifically names the materials to be seized, violate the First, Fourth and Fourteenth Amendments of the United States Constitution?

2. Does the leafing through a book or magazine and the viewing of a small part of a film by a judge enable the judge to focus searchingly upon the obscenity of the work as a whole, and thus constitute sufficient prior judicial scrutiny of expression presumptively protected by the First Amendment to warrant the seizure of such material from a bookstore?

3. Does the seizure of all copies of a film, book, or magazine determined by a judge, ex parte, to be obscene, thereby totally suppressing the dissemination of such presumptively protected expression prior to an adversary hearing and a final adjudication of its obscenity vel non, constitute a total prior restraint and violate the First, Fourth and Fourteenth Amendments?

4. Can a signed incomplete search warrant which is completed by a policeman after the search and seizure of books, magazines and films from a bookstore, validate such search and seizure nunc pro tunc?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution, as well as section 235.05(1) of the New York State Penal Law (McKinney's Consolidated Laws of New York, 1967 ed., as amended by New York Law 1969, p.76) are set forth in Appendix D hereto.

STATEMENT OF THE CASE

On June 20, 1976 a police officer entered the store of the petitioner and purchased two 8 millimeter reels of motion picture film entitled "Linda and Duke" and "Four for Dinner". The police, believing these films to be obscene and typical of other films and magazines sold in the petitioner's bookstore, submitted an affidavit to Judge John O'Connor requesting that the Judge accompany the police officers in the execution of a warrant to be issued for the seizure of "additional matter present in the aforedescribed premises possessed in violation of the law and therefore subject to seizure."

It was further requested in the affidavit that the court issue a search warrant for the seizure of all copies of the two films already purchased by the police officer and for "any other material that

the court may independently determine upon viewing to be possessed in violation of Article 235 of the Penal Law."

Several days later, on June 25, 1976, a massive raid and search was conducted at the premises by the Judge, various officials of the District Attorney's Office and over a dozen police officers.

The authority for the general search of the entire premises and seizure of a substantial portion of the inventory in the premises and projectors, much of which could not be scrutinized without the destruction of the heat-sealed cellophane wrapper totally enclosing each magazine and book, was an incomplete warrant merely listing the 2 films previously purchased by the aforementioned policeman. The search warrant, which was signed by Judge O'Connor, called for the seizure of all additional copies of the previously purchased films of June 20, 1976. Space was left on the incomplete search warrant for the insertion of the names of additional films, books and magazines.

Upon entry into the premises the clerk was arrested, all customers were expelled and the store was closed for further business. The Judge glanced through and at hundreds of films, books and magazines without reading or viewing any in its entirety. No more than a few seconds were spent looking at any one item. The Judge, on the basis of this rather superficial examination, told the accompanying police which films, books and magazines he considered obscene and all copies of such material were stacked for removal and then carted away.

When the police returned to headquarters with the seized materials, two typists were summoned and, outside the presence of Judge O'Connor, the search warrant was finally completed by the listing of all the items that were seized.

It cannot be overemphasized that most of the magazines in the store were wrapped in cellophane and could not be subjected to judicial scrutiny without the performance of a search and seizure, to wit, the tearing of the cellophane. When the raiders entered the store, closed it for business, arrested the clerk, and began their general search of the premises, there had been neither prior judicial scrutiny of the material mentioned in the subsequently completed warrant nor probable cause for the issuance of said warrant. Furthermore, there was never proper judicial scrutiny of the expressive material since the whole book rule requires that a work must be read, viewed and judged in its entirety before any determination of obscenity vel non may be made. Nothing could be clearer than the requirement that a work must be judged "as a whole", something that cannot be accomplished without a complete viewing of the entire work. See Roth v. United States, 354 U.S. 476 (1954) and Miller v. California, 413 U.S. 15 (1973).

Petitioner's motion to suppress was denied and, upon a plea of guilty, petitioner was convicted in the Criminal Court, Town of Wawayanda, County of Orange on three counts of obscenity in the second degree, promoting or possessing with intent to promote obscene material. The propriety of the search was upheld and the judgment of conviction sustained by

the Appellate Term and the Court of Appeals denied leave to appeal.

ARGUMENT

I

THE SEARCH OF A BOOKSTORE AND THE SEIZURE OF 790 COPIES OF BOOKS, MAGAZINES AND FILMS PRESUMPTIVELY PROTECTED BY THE FIRST AMENDMENT CONDUCTED AND EFFECTUATED PRIOR TO THE ISSUANCE OF A WARRANT WHICH SPECIFICALLY NAMES THE MATERIALS TO BE SEIZED VIOLATES THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS.

Prior to the decision of the New York Court of Appeals in 1971 in the case of People v. Heller, 29 N.Y.2d 319, 327 N.Y.S.2d 628 (1971), it was the law in this jurisdiction as in most other jurisdictions throughout the United States that there could be no seizure of expressive material without a prior adversary hearing and judicial determination of the obscenity vel non of such material. Astro Cinema Corp. v. McKell, 422 F.2d 293 (1970); Bethview Amusement Corp. v. Cahn, 416 F.2d 410, cert. denied, 397 U.S. 920.

With the decision in Heller, it became the law of the State of New York that an evidentiary seizure of one copy of expressive material could be founded upon the prior judicial scrutiny of such material and determination of the obscenity thereof. The decision of the Court of Appeals was upheld by the United States Supreme Court in Heller v. New York, 413 U.S. 483 (1973) which upheld the New York procedure of prior judicial scrutiny as a

condition precedent to an evidentiary seizure of a single copy of expressive matter.

It must be strongly emphasized that the decision as to whether a particular item is obscene must not be taken too lightly. The seizure of material by law enforcement officers on grounds of obscenity potentially violates both the First and Fourth Amendments guaranteeing freedom of expression from unreasonable searches and seizures. Especially with regard to the First Amendment, not only are the rights of the owner of material involved, but also the rights of the potential audience are significantly at stake. The confluence of rights under the First and Fourth Amendments, and of rights on behalf of more than one person, was examined by the Supreme Court in Roaden v. Kentucky, 413 U.S. 496 (1973) where the Court was led to conclude that a "higher" than ordinary hurdle must be met in the issuance of warrants for the seizure of expressive matter, as opposed to non-expressive matter. The Court there stated:

> "The Fourth Amendment proscription against unreasonable . . . seizures, applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material . . . the seizure of instruments of crime, such as a pistol or knife, or contraband or stolen goods or objects dangerous in themselves . . . are [sic] to be distinguished from quantities of books and movie

films when a court appraises the reasonableness of seizure under Fourth or Fourteenth Amendment standards." 413 U.S. at 501-502

The Court in Roaden, after reviewing earlier decisions, continued:

> "In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is unreasonable in the light of values of freedom of expression." 413 U.S. at 504

Thus, Roaden clearly held that a seizure which effects a prior restraint within the meaning of the First Amendment constitutes an unreasonable search and seizure under the Fourth Amendment.

Where, as in the instant case, the pre-seizure adversary hearing is dispensed with, in deference to single copy evidence-gathering interests, the need to assure the constitutional sufficiency of the warrant becomes all the more urgent. In Marcus v. Search Warrant, 367 U.S. 717 (1961), the Supreme Court held that procedures followed under a state statute in the seizure of a mass of printed, allegedly obscene publications violated the First Amendment. The Court proceeded from the premise that the "power of search [can] be an instrument for the stifling of liberty of expression", 367 U.S. at 729. Although conceding that obscene material "is not within the area of constitutionally protected speech or press", 367 U.S. 730, the Court emphasized the requirement for "safeguards . . . to assure non-obscene material the constitutional protection to which it is entitled", 367 U.S. at 731. The Court concluded in Marcus that in order to avoid a prior restraint in violation of constitutional guarantees, there must be a "step in the procedure before seizure designed to focus searchingly on the question of obscenity." 367 U.S. at 732

The police officer and judge did not take the necessary constitutional precautions to insure a proper search and seizure of books, magazines and films sold in a bookstore. Such items are presumptively protected by the First Amendment and may not be seized unless certain

procedures are followed. The search and seizure in the instant case did not adhere to these procedures. The search and seizure in the petitioner's bookstore was based on an incomplete search warrant specifying only two films.

The Supreme Court in Heller allowed New York to forego the normally required adversary hearing before the search and seizure of expressive material because it was felt that if the prosecutor's case was based on one particular item, the use of an adversary hearing would allow a defendant to evade prosecution through the use of devious means; "that such films may be compact, readily transported for exhibition in other jurisdictions, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film." 413 at 493.

Here the search and seizure of multiple copies of literally hundreds of films, magazines and books forecloses the possibility that the defendant would or could resort to such means of evasion. Therefore this is not the kind of situation the Court in Heller had in mind when it created an exception to the general rule of requiring an adversary hearing prior to conducting a seizure of expressive material.

Furthermore, even if the exception of Heller did apply, which it does not, the judge in the instant case did not even fulfill the obligations of the alternate procedure set out in Heller, Judge O'Connor did not take the necessary steps to make a determination whether there was probable cause to seize the other 788 items in the petitioner's store that were not originally mentioned in the search warrant. The requirement that a neutral magistrate focus searchingly on the issue of obscenity prior to seizure was not met.

Clearly the way in which the search and seizure was carried out by the police, Judge O'Connor and members of the District Attorney's office violated the petitioner's First, Fourth and Fourteenth Amendment rights.

II

JUDGE O'CONNOR, WHILE CONDUCTING THE SEARCH AND SEIZURE OF THE PETITIONER'S BOOKSTORE, DID NOT COMPLY WITH THE "WHOLE BOOK RULE" IN DECIDING WHICH BOOKS, MAGAZINES AND FILMS WERE TO BE DECLARED OBSCENE AND HENCE SUBJECT TO SEIZURE.

Justice Brennan's decision in Roth v. United States, supra, rejected the view of the landmark English case Regina v. Hicklin, LR 3 QB 360 (1864) which held that materials could be declared obscene on the basis of isolated passages. Items presumptively protected by the First Amendment could now only be declared obscene if ". . . to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489 (Emphasis supplied.)

This test has been interpreted to mean that a judge has a duty, before declaring a particular work obscene, to examine it as a complete entity. The

judge must not declare a movie obscene until he has sat through an entire showing. The judge must not declare a book obscene, until he has read the book in its entirety. If the judge fails to make such an exacting scrutiny, he will run the risk that a noteworthy book, magazine or movie will be suppressed merely because of the author's desire to include in his work a detailed discussion of the sexual aspects of the topic at hand. This stringent test has been continued by Miller v. California, supra.

This is not a case such as Heller, supra, where a judge lawfully entered a theater, took his place in the audience, viewed the entire film, determined its obscenity vel non, and issued a warrant for the seizure of one copy of the film as evidence to be used in connection with the simultaneous arrest of its exhibitor.

In the instant case, the judge during the course of the search and seizure declared over seven hundred items obscene in the space of a few hours. Obviously he did not have time to give a proper examination to any of the items. At best the judge could only give an item a fleeting, cursory examination. This procedure of evaluation in no way satisfies the requirements of Miller and Roth.

III

THE POLICE BY SEIZING ALL AVAILABLE COPIES OF ALL BOOKS, MAGAZINES, AND FILMS OWNED BY THE PETITIONER HAVE CONDUCTED A SUPPRESSIVE SEARCH EFFECTING A TOTAL RESTRAINT PRIOR TO A FINAL DETERMINATION OF OBSCENITY.

The Supreme Court in Heller v. New York, supra, made it clear that prior judicial scrutiny could not support a suppressive search, i.e. a seizure of more than one copy of a work. The Court stated on page 492:

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the Trial Court that other copies of the film are not available to the

> exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise the film must be returned."

From the foregoing, it is abundantly clear that even prior judicial scrutiny could not support the massive seizure which took place in the defendant's premises. It is also apparent that the seizure must follow the judicial scrutiny, not, as in the instant case, precede it.

If the decision in our Court of Appeals and in the United States Supreme Court in Heller, supra, was not sufficient to establish the clear principle, People v. Abronovitz, 31 N.Y.2d 160, 335 N.Y.S. 2d 279 (1972), 286 NE 2d 721 clearly does so. In that case, as in the instant case, a police officer brought before a judge certain magazines which he lawfully acquired, requesting that the judge issue a search warrant for the seizure of similar material possessed in and from the store. The warrant was issued and the police seized over 1,000 magazines and calendars from the defendant's premises while arresting the defendant on obscenity charges. Citing A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Marcus v. Property Search Warrant, 367 U.S. 717 (1961) as well as People v. Heller, supra, New York's Court of Appeals suppressed and reversed.

In the instant case, the only difference between the Abronovitz seizure and our seizure is that the judge accompanied the police officers in conducting

the warrantless search and seizure. In Abronovitz, there was a warrant issued by the judge preceding the search and seizure. In the instant case there was not even such a warrant. If it is the position of the People that the accompaniment of a judge in the making of an illegal search and seizure turns what would violate the Fourth Amendment into a constitutional procedure, such contention would indeed be novel.

The search warrant in the instant case directed the police officers to seize all copies of the two aforementioned films which the policeman had brought to the judge. During the course of the search of the petitioner's bookstore, with respect to more than one hundred items of expressive material, the police officers were directed by the judge to seize not one copy of each allegedly obscene film, book and magazine, but all copies. Clearly this is what this Court in A Quantity of Books and Marcus had in mind when it banned suppressive searches.

IV

AN INCOMPLETE SEARCH WARRANT ULTIMATELY COMPLETED AFTER THE SEARCH AND SEIZURE OF THE PETITIONER'S BOOKSTORE IS NO DIFFERENT THAN A GENERAL WARRANT. GENERAL WARRANTS HAVE ALWAYS BEEN PROHIBITED.

General warrants are prohibited by the Fourth Amendment. "The problem [posed by the general warrant] is not that of intrusion per se, but of a general exploratory rummaging in a person's belongings . . . [the Fourth Amendment addresses this problem] by requiring a par-

ticular description of the things to be seized." Andressen v. Maryland, 427 U.S. 463 (1976) quoting Coolidge v. New Hampshire, 407 U.S. 443 (1971). In Marcus v. Property Search Warrant, supra, Justice Brennan presented a history of the general warrant and demonstrated how it had been used by a tyrannical monarchy to deprive its citizenry of basic rights. In a footnote Justice Brennan illustrated how popular feelings in the late eighteenth century caused the general warrant to be abolished:

> "A contemporary London pamphlet (1764) summed up the widespread indignation against the use of the general warrant for the seizure of papers. 'In such a party-crime as a public libel, who can endure this assumed authority of taking all papers indiscriminately? . . . [W]here there is even a charge against one particular paper, to seize all, of every kind, is extravagant, unreasonable and inquisitorial. It is infamous in theory, and downright tyranny and despotism in practice.'" Marcus, supra, quoting "Father of Candor, a Letter Concerning Libels, Warrants and the Seizure of Papers," p. 48 (2nd ed. 1764, J. Almon Printer).

In the instant case the authority for the search and seizure was based on an incomplete search warrant which listed only the two aforementioned films. After the search and seizure in the petitioner's store was completed, all the confiscated materials were brought to the police

headquarters. Two typists were summoned to make an inventory of all confiscated materials. Once the list was completed, the other 788 items were added to the search warrant without Judge O'Connor being present. The People seem to suggest that on the strength of a warrant listing only two items, there is proper authority to seize 788 other items. In reality what the People are depending on for the authority for their search and seizure is a general warrant.

As mentioned before, when analyzing whether a particular search and seizure is legal, a higher standard of judicial scrutiny must be applied to items presumptively protected by the First Amendment. Obviously the same logic must hold true when examining the legitimacy of a search warrant:

> "In short . . . the constitutional requirement that warrants must particularly describe the things to be seized is to be accorded the most scrupulous exactitude when 'the things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." Roaden v. Kentucky, 413 U.S. 496, 504 (1973) quoting Standford v. Texas, 379 U.S. 476, 505 (1965).

The search warrant used in the instant case did not meet these strict standards and therefore the authority on which the search and seizure was based was faulty.

In the nineteenth century the English Parliament saw the dangers of the general warrant. There is no question that these same dangers exist today.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX A

OPINION OF STATE OF NEW YORK, COUNTY OF ORANGE, LOCAL CRIMINAL COURT

STATE OF NEW YORK: COUNTY OF ORANGE
LOCAL CRIMINAL COURT: TOWN OF WAYWAYANDA
----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

LOJI SALES, INC.,

Defendant.

----------X

The defendant having moved for suppression of all evidence seized in a raid at the Adult Store, New Hampton, New York, a hearing was held to determine the issues raised. Upon completion of said hearing I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

On June 25th, 1976 at approximately 9:00 A.M., Mr. Johannes Hurbanek, an investigator with the B.C.I. met Town Justice John O'Connor at the District Attorney's office in Goshen, New York. Mr. Hurbanek showed Justice O'Connor two films he had previously purchased at the Adult Store. Mr. Hurbanek then made out an affidavit for the search warrant. Judge O'Connor issued the search warrant. Mr. Hurbanek thwn asked Judge O'Connor to accompany him to the Adult Book Store

to make Judicial determination of obscene material and to seize any said obscene material. At the intersection of Denton Hill Road and Route 17M in the Town of Waywayanda, they met with other police officers at which time Judge O'Connor signed the search warrant and also issued a warrant of arrest. At about 11.13 A.M. they entered the store. Mr. Hurbanek advised Mr. Mandakis of his rights and advised him that he was under arrest for Obscenity Second Degree. He was also advised that the officer had a search warrant and that Judge O'Connor was present to make a determination on all the material in the store. Mr. Mandakis offered to turn on the main switch so that Judge O'Connor could view the movies without putting any quarters into the machines. The Judge commenced to go into each booth and view each film while Mr. Hurbanek was taking notes for him. After Judge O'Connor viewed each film enough to make his determination, he ordered the film to be seized. They then went into the two rooms in the back of the building which each contained two separate films. Judge O'Connor viewed the films while Mr. Hurbanek took notes. The Judge ordered that these films also be seized. Judge O'Connor then started to view the magazines, books and newspaper type tablets that were out for sale. Some of the magazines and books had a cellophane wrapping on them and Judge O'Connor directed others in the detail to remove the wrappings so he could view the articles. After viewing the books and magazines he ordered them to be seized. Judge O'Connor followed this same procedure throughout each section of the store viewing each article as Mr. Hurbanek took notes and seized any item as

ordered by Judge O'Connor. The viewing and seizure of articles as Judge O'Connor directed was finished at approximately 5:00 P.M.

CONCLUSIONS OF LAW

I find that Town Justice O'Connor's viewing of each film, book and each piece of material to the extent that he was satisfied that there was reasonable cause to believe that said film, books and material was obscene within the definition of the Penal Law of New York State constituted a proper and adequate Judicial screening was required under (People vs. Heller 29 New York 2nd-319).

That the operator of the store, (Alexander B. Mandakis, Sr.) consented for Justice O'Connor to view each film without inserting any money.

Since Justice O'Connor only examined items that were on display racks, in open view to the public during business hours; after the manager (Alexander B. Mandakis, Sr.) was arrested on warrant; therefore, under People vs. Matherson the Judge could properly view, without buying any material.

That every item was seized pursuant to the search warrant signed by Town Justice John O'Connor; and only after Justice O'Connor independently determined that the seizure of each item was legal and proper.

That since the warrant entitled the defendant to an immediate adversary hearing, the defendant's rights to a neutral and detached determination of obscenity

and prompt, full adversary hearing on the same question of obscenity were not violated in any manner.

I find that there was no massive seizure of material, so that the store was not put out of business for any significant time.

I therefore conclude that all the procedures followed by the police and Justice O'Connor did not violate any of the defendant's constitutional or statutory rights.

Therefore, the defendant's motion to suppress the physical evidence is denied in each and every respect.

The foregoing constitutes the decision and order of the Court.

DATED: New Hampton, New York
November 13, 1976

S/ FRANK L. GIZA
Frank L. Giza
Town Justice
Town of Waywayanda

APPENDIX B

ORDER OF THE APPELLATE TERM

135-1978
March Term 1978

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County, on the 25th day of April, 1978.

Present-- Hon. Thomas P. Farley,
Presiding Justice
" " David L. Glickman
" " Mario Pittoni
Justices

The People of the State of New York
Respondent,
vs.
Lo-Ji Sales, Inc.
Appellant.

The above named Lo-Ji Sales, Inc. the defendant herein, appealed to this Court from a judgment of the Local Criminal Court, Town of Wawayanda, County of Orange rendered on the 3rd day of February 1977, convicting it of a violation of Section 235.05(1) Penal Law (three counts) and imposing sentence as follows:

Fine $1000 each count

and the said appeal having been submitted

by Herbert S. Kassner, Esq., of counsel for the appellant, and submitted by Richard L. Walker, Esq., of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, affirmed.

S/ DAVID L. BLICKMAN
Assoc. Justice, Appellate Term

APPENDIX C

APPLICATION FOR LEAVE TO APPEAL FILED AND DENIED BY THE NEW YORK COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

Before: HON. LAWRENCE H. COOKE,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

Lo-Ji Sales, Inc.,
Appellant.

CERTIFICATE DENYING LEAVE

I, LAWRENCE H. COOKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
July 5, 1978

S/ Lawrence H. Cooke,
Associate Judge

*Description of Order: Order of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, entered April 25, 1978, affirming a judgment of the Local Criminal Court, Town of Wawayanda, County of Orange, rendered February 2, 1977, convicting appellant of a violation of section 235.03 (1) of the Penal Law (three counts).

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

* * * * * *

New York Statute

Penal Law

§ 235.05 Obscenity in the second degree.

A person is guilty of obscenity in the second degree when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity in the second degree is a class A misdemeanor.

As amended L.1969, c.583, § 2, eff. Sept. 1, 1969.

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 26, 1978
CERTIORARI GRANTED NOVEMBER 27, 1978

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Relevant Docket Entries

[Each entry set forth below is entered on each of three separate pages in the actual docket book, once for each of the three charges which were filed against petitioner]

STATE OF NEW YORK

COUNTY OF ORANGE

Local Criminal Court: Town of Wawayanda

THE PEOPLE OF THE STATE OF NEW YORK,

—v.—

LO-JI SALES, INC.

6/25/76	(Information) (Misdemeanor Complaint) (and attached Supporting Deposition) filed. (Affirmed) (Verified) and subscribed by J. A. Hurbanek.
8/27/76	Suppression Hearing held.
11/13/76	Defendants Motion denied.
2/ 3/77	Defendant plead guilty to Obscenity—2nd deg.
2/ 3/77	The following sentence was imposed: $1,000.00 fine.
2/ 3/77	Fine will not have to be paid to give attorneys a chance to file for an appeal.

Information/Complaint

(Secs. 100.05-100.50 CPL)

LOCAL CRIMINAL COURT
Town of Wawayanda, County of Orange, New York

THE PEOPLE OF THE STATE OF NEW YORK,

—v.—

LOJI SALES INCORPORATED, 128-132 North Eigth [sic] St., Allentown, Pa., JOHN KRASNER & ALEXANDER MANDAKIS.

I, J. A. Hurbanek, the COMPLAINANT herein, am a police officer of the State of New York, to wit, a(n) Investigator of the New York State Police attached to Troop F, stationed at Middletown, New York.

I ACCUSE LOJI SALES INCORPORATED/JOHN KRASNER & ALEXANDER MANDAKIS, the DEFENDANT(S) in this action and charge that on or about the 25th day of June, 1976, at ADULT STORE in the Town of Wawayanda, County of Orange, New York at about 11:00 o'clock in the forenoon said DEFENDANT(S) did intentionally knowingly and unlawfully COMMIT THE misdemeanor(s) of OBSCENITY IN THE SECOND DEGREE—Three Counts contrary to the provisions of Section 235.05, subdivision 1 of the Penal Law of the State of New York.

THE FACTS ON WHICH THIS ACCUSATION IS MADE ARE OF MY OWN KNOWLEDGE OR ON INFORMATION AND BELIEF AS FOLLOWS:

Information/Complaint

A. OF MY OWN KNOWLEDGE and based on information and belief, said belief being the seizure of obscene material, a person is guilty of obscenity when, knowing its content and character he: Promotes, or possesses with intent to promote, any obscene material, to wit; at the afore mentioned time and place, defendants did:

COUNT ONE: Possesses 400 books which depicts and describes in an offensive manner deviate sexual intercourse and deviate sexual acts.

COUNT TWO: Possesses 474 movie reels which depicts and describes in an offensive manner deviate sexual intercourse, deviate sexual acts and beastiality.

COUNT THREE: Possesses 26 Movie projectors, five with sound, which depicts and describes in an offensive manner deviate sexual intercourse and deviate sexual acts.

WHEREFORE I REQUEST THAT A WARRANT BE ISSUED FOR THE ARREST OF THE DEFENDANT

/s/ J. A. HURBANEK
Complainant

Information/Complaint

NOTE: False statements made herein are punishable as a Class A misdemeanor pursuant to Section 210.45 of the Penal Law

Sworn to before me this
15th day of July, 1976

/s/ JOHN O'CONNOR
(Signature)
Town Justice
(Title)

Relevant Documents Pertaining to the Search and Seizure

LOCAL CRIMINAL COURT
Town of Wawayanda

AFFIDAVIT

IN THE MATTER

—of—

THE APPLICATION OF INV. J. A. HURBANEK OF THE NEW YORK STATE POLICE, FOR A SEARCH WARRANT TO SEARCH THE FOLLOWING PREMISES: A single story brown wood frame building named "Adult Store", located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

STATE OF NEW YORK,
COUNTY OF ORANGE, *ss.*:

I, JOHANNES A. HURBANEK, being duly sworn, deposes and says:

1. I am the applicant herein and am a public servant of the kind specified in Criminal Procedure Law, Section 690.05(1), my title being Investigator with the Bureau of Criminal Investigation of the New York State Police.

2. There is reasonable cause to believe that certain property hereinafter described may be found in the following premises: a single story brown wood frame building named "Adult Store", located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

Affidavit of Investigator J. A. Hurbanek

3. The property referred to sought to be seized is property that has been used and is possessed for the purpose of being used to commit an offense to wit: Obscenity in the Second Degree, in violation of Section 235.05(1) of the Penal Law, Promoting Obscene Material.

3. In support of your deponent's assertion as to the existence of reasonable cause, the following facts are offered based upon personal knowledge as attested to by your deponent. On June 20, 1976, I personally was present in the aforedescribed premises (Adult Store) and purchased from Alexander Mandakis one reel of 8mm motion picture film approximately 200 feet in length called LINDA AND DUKE. Upon viewing this reel of motion picture film, I observed it to contain acts of female masturbation and activities involving beastiality in that a female participant in the movie attempted to engage in acts of sexual intercourse with a German Shepard type dog. I also purchased a reel of super 8mm motion picture film approximately 200 feet in length entitled FOUR FOR DINNER. Upon viewing this reel of film, I observed acts of sexual intercourse, sodomy, fellatio, cunnilingus, and masturbation. These reels of film are presently in my possession and are available for the viewing of the Court so that it may independently determine whether or not the acts portrayed come within the statutory prohibition under Article 235 of the Penal Law.

4. While in the premises, I observed what I have reasonable cause to believe are the same or similar films. I also observed in the premises other reels of film, magazines and other objects. Based upon my observations, and my conversations with Mr. Mandakis which indicated to me that

Affidavit of Investigator J. A. Hurbanek

the films and magazines portrayed similar activities as described above, I have reason to believe that this material is being possessed in violation of Article 235 of the Penal Law of the State of New York.

5. The foregoing represents the grounds for my belief.

6. It is further respectfully requested that the Court accompany deponent at the time of the exectuion of the warrant applied for so that it can independently determine under the applicable legal principles whether or not any of the additional material present in the aforedescribed premises is in fact possessed in violation of the law and therefore subject to seizure.

WHEREFORE, your deponent requests that the Court issue a search warrant directing a search for and seizure of the following property:

1.) 200 foot reels of 8mm motion picutre film entitled LINDA AND DUKE.

2.) 200 foot reels of super 8mm motion picture film entitled FOUR FOR DINNER.

3.) Any other material that the Court may independently determine upon viewing to be possessed in violation of Article 235 of the Penal Law.

/s/ J. A. HURBANEK
Johannes A. Hurbanek

Sworn to before me this
25 day of June, 1976.
/s/ JOHN O'CONNOR, *T.J.*

LOCAL CRIMINAL COURT
Town of Wawayanda, County of Orange,
State of New York

HONORABLE JOHN O'CONNOR,
Issuing Judge.

TO ANY POLICE OFFICER OF THE NEW YORK STATE POLICE

You are hereby authorized and directed to search the following premises: a single story brown wood frame building named "Adult Store", located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

You are hereby authorized and directed to search for and seize the following property, to wit:

1.) 200 foot reels of 8mm motion picture film entitled LINDA AND DUKE.

2.) 200 foot reels of super 8mm motion picture film entitled FOUR FOR DINNER.

3.) The following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law:

1. Pretty #2, 2 copies
2. Hard Reamers, Vol. 1, #1, 1 copy
3. Sex Act, Bk. 1 (1)
4. Orgy 200 (1)
5. First Me (2)
6. Special Gift (2)
7. Hard-On Haven (1)

8. Sex and Ecsasty (3)
9. Playful Lovers (2)
10. Hard Act, Vol. 1, #1, (1)
11. Primer for Sexual Education, Vol. 8, (1)
12. Sex'ionary, Vol. 1, #2 (1)
13. Enrapt Pairs, Vol. 1, #1 (1)
14. Lips and Tongue Sex, (1)
15. Carnel Knowledge, Vol 2, #3 (1)
16. Amour (6)
17. Carnel Bk. 1, (2)
18. Sexual Release, Vol. 1 #1 (1)
19. Hot and Horny (1)
20. Literotica Vol. 1, #1 (2)
21. Erotiton Bk. 2 (2)
22. Party Girl #2, (1)
23. Sluts (2)
24. Nique (2)
25. Sex Seekers Vol. 1, #1 (1)
26. Valerie (1)
27. Afro Fuck Inter Racial (1)
28. Piss Ass (2)
29. Inter Play Vol. 1, #1 (1)
30. Organism Bk. 1 (2)
31. All Color Poker, (2)
32. Sex Strokers, Vol. #1, (2)

/s/ JAH

33. Sex on Campus (2)
34. Teach me to take It (1)
35. Sex Critique (4)
36. Real Sex (4)
37. The American Sex Scene Vol 4 (1)
38. The American Sex Scene Vol. 3 (3)
39. Sizzling Hot (1)

40. Pleasure Bk. 2, (2)
41. Fuckum (3)
42. Sex and The Swinging Singles Vol. 1, Bk. 1, (2)
43. Cherry Pie, Vol. 1, #1, (2)
44. The Good Life Vol. 1, #2 (1)
45. Single Swingers (5)
46. Answers, Vol. 1, #3 (1)
47. Sexcope Vol. 1 #4, (1)
48. Sex in America Bk. 3 (1)
49. Electra, Vol 6, #2 (1)
50. Sexual Pursuits, #2 (2)
51. Response, Vol. 5, #1 (2)
52. Sex World, Bk. 5 (1)
53. Woman Together, Vol. 1, #2 (1)
54. Hells Bedroom (4)
55. Sex Drive, #5, (1)
56. Sex and Pornography #4, (1)
57. Sex and Pornography #1, (1)
58. Hot and Hung (1)
59. Weekend with the Boss (2)
60. The Sex Scene (1)
61. A Dream Cums True (3)
62. Toppers Vol. 1, #1, (1)
63. Sexways Vol. 1, #1 (1)
64. Dreamy Sisters (4)
65. A Models Story (1)
66. Informed, #3, (1)
67. Informed, #7, (1)
68. Informed, #5, (3)
69. Sex and the Single State, Vol. 1, #1 (1)
70. Fly Her Frieidly Thighs, (1)
71. Love and Lust (1)
72. Suckfest (3)

73. The Devil Made Me Do It Vol. 1, #3 (6)
74. Get Down with-3, (1)
75. Prince #10, (5)
76. Partner #2, (3)
77. Selecta (2)
78. Prince #11, (2)
79. Anal-Sex, #12, (1)
80. Con Amore #9, (1)

/s/ *JAH*

81. Private #20, (1)
82. Private #18, (2)
83. Dream (10)
84. Climas #208 (1)
85. Climax #207, (1)
86. Prince #8 (3)
87. Danish Games, Vol. 1 #7, (1)
88. Partner #1, (1)
89. Partner #4, (5)
90. Ero #5, (1)
91. Ero #6 (1)

The above Books are from wall "A".

The following are books located on center table:

1. Call Boy #5 (1)
2. Virgin Territory (2)
3. The Oriental Split #1
4. Whoring Hichhikers, Vol. 1, #2
5. Teen Teasers, Vol. 1 #2
6. Naked
7. Mother Truckers, Vol. 1, #3
8. Throb (6)

9. Switch Vol. 1, #1
10. Hump #5, (15)
11. World of Love and Sex, Bk. 7
12. Close-Up, Vol. 2, #5
13. Primates, Vol. 1, #1
14. Climax (5)
15. The Many Faces of Philbert Foxhunt (9)
16. Swing, #5
17. Eroctic Humor, Vol. 2, #2, (4)
18. Mike's Muscle
19. Greek Lightning
20. Straight to the End, #1 (3)
21. Coming My Way, Stud #1, (2)
22. Less Love, Vol. 1, #1
23. Leather Bondage Techniques, Vol. 1
24. The Cruiser, Vol. 3
25. Visitors Welcome, Vol. 1, #1 (2)
26. The Long Horns, Vol. 1, #1
27. Blast Off, #2
28. My-O-My, Vol. 2
29. Garden Tools, Vol. 1, #1
30. Humpy Jocks, First Issue

/s/ JAH

31. Finger Lickin Good
32. Keep on Coming, Stud No. 4
33. Chain Male, #3
34. Strangers in the Night, #1
35. Head Strong
36. Meat Rack, Vol. 1, #1
37. Caught Hot Handed, Vol. 1, #1
38. Swinging in the Rain, Far Out #2
39. The Best of Town, #1

40. I'll pay By the Inch, #1
41. Modern Girls, #1
42. Enjoy, #1
43. Reflections of Youth
44. Sock it to Me (3)
45. The Gay Cure
46. Chicken Delite (3)
47. Aces, Vol. 1, #1
48. Prickly Heat, Stud #2
49. Stud Time, Issue 1
50. Chains
51. Combo #1
52. Flesh Parad
53. Mod Age, Vol. 1, #4
54. Bodies in Bondage, Vol. 1, #3
55. Everybody Needs Meat, Stud #3
56. Heavy Hitters, Vol. 1, #1
57. Cock Crazy Kids, (3)
58. The Best of Tom, #2
59. Tempt'n Teens
60. Genitalia
61. The Phallus

/s/ JAH

The following books were located on the rear wall

1. Blast Off, #2
2. Coming Up Strong, #2
3. Greek Lighting, #4
4. Blast Off, #1
5. Hard to Handle, #2
6. Tongue 'n Cheek
7. The Defiled Facist #4
8. Coming My Way, Stud no. 1

9. Man's Best Friend, Kinicks #5
10. Keep on Coming, Stud No. 4 (2)
11. Cock Crazy Kids
12. Hard Up House Boy
13. Straight to the End, #1
14. Making It Big in San Francisco
15. Virgin Territory (2)
16. Colorviews (2)
17. Take It as It Comes
18. Prickly Heat, Stud No. 2
19. The New Dudes, Vol. 1, #2
20. Try It for Size
21. Leather Bondage Techniques, Vo. 4
22. The Cruiser, Vol. 3
23. Cock Rings, Chains and Things, (2)
24. Hustling Dudes, Vol. 1, #1
25. Chicken Delite
26. Tweak
27. I'll Pay By the Inch, #1
28. Body Motions
29. Swing In The Rain
30. The Bigger They Come, Vol. 1, #1
31. Erotic Hands, (2)
32. Boy Chicks, Vol. 1, #1
33. Meat Rack, Vol. 1, #1
34. The Intruder
35. Brutle Birthday Knights of the Night, No. 2
36. /s/ *JAH*

The following books were located in boxes behind the front

1. Private #22
2. Private #18
3. Private #21
4. Teenagers Loving Weekend, Volumne 1, #1
5. Succotash Volumne 1, #2
6. Answers, Volumne 5, #3
7. The Sinners
8. Curious, #6
9. Marriage Carousel
10. Enjoy
11. Full Swing
12. Sex Reflection #5, Volumne 1, #1
13. Sticky Fingers, Volumne 1, #1
14. Mated, #2
15. The Paperboy, LLP/2019
16. Response, Volumne 4, #4
17. Pleasure, Volumne 1, #2
18. Teacher's Pets SLP/1008
19. Auntie Loves Me
20. Sexscope, Volumne 4, #4
21. Substitute Wife, #635
22. Teenage Sandwich, T-202
23. Sexual Behavior and the Law, Volumne
24. Hold His Cock, 7/203
25. Manuals of Sex Magic, OSL/9617
26. Study of Wife Swapping, Series 1002

Books behind front counter

1. Liquid Plumber, Kiniks, No. 6
2. Strangers in the Night, No. 1

3. Mandate, Volumne 1, #1
4. Drawn and Quarters, #1
5. Gay Studs, Volumne 5, #1
6. Afro Fuck
7. Feminine Hygiene and Masturbation
8. Naked Nurses, Volumne 6, #4
9. Unnatural Sex Acts
10. Trusting Couples, Volumne 1, #1
11. Games People Play
12. Orgasm, Volumne 1, #1
13. The Teacher's Wife CCP/3013
14. Stick It In
15. Young Hard Studs, Volumne 1, #1
16. Hard Heads
17. The Sinners
18. Hard Up Houseboy
19. Stiff Pricks

/s/ JAH

20. Hot and Horny, Volumne 1
21. Head On
22. Solo Sex, Female Masturbation, #2
23. Sexdrive, #6
24. Dirty Martha
25. Fucking Freaks
26. Tongue Lashing, Ball #4
27. Casebook, Volumne 2, #1
28. Get Down with-3
29. Fuck Free
30. Orgy, No. 3, #30
31. Ankh, Volumne 6, #2
32. Sexualis, Volumne 1, #1

33. Explicit, Volumne 1, #2
34. Swingers, #31, #3
35. Right One
36. Triple Headers
37. Around the World
38. Hookers, #1
39. Sex, Singles and Society, #9630
40. Animal 14,

/s/ JAH

THE FOLLOWING ITEMS SEIZED FROM PROJECT BOOTHS & ROOMS

Booth #1, One film depicting two white females, one white male, acts of sodomy and intercourse, Bolex 18 5L projector.

Booth #2, One film depicting white male and negro female, acts of sodomy and intercourse, Vivitar projector

Booth #3, One film depicting white male and white female, acts of sodomy and intercourse, Vivitar projector

Booth #4, One film depicting white male and white female, acts of sodomy and intercourse, Vivitar projector

Booth #5, One film depicting white male and white female, acts of sodomy and intercourse, Vivitar projector

Booth #6, One film depicting white male and white female, acats of sodomy and intercourse, Vivitar projector

Booth #7, One film depicting two white females acts of fingering and use of dildos, Vivitar projector

Booth #8, One film depicting two white females and white male acts of sodomy and intercourse, Vivitar projector

Booth #9, One film depicting one white male and white female joined by second white male, acts of sodomy and intercourse, Vivitar projector

Booth #10, One film depicting two white males, acts of sodomy, Vivitar projector

Booth #11, One film depicting white male and white female joined by another white male and white female, acts of sodomy and intercourse, Bolex, 18-5L projector.

Booth #12, One film depicting white female and white male, acts of sodomy and intercourse, Vivitar projector

Booth #13, One film depicting white female and white male, acats of sodomy and intercourse, Urban Industries projector.

Booth #14, One film depicting two white females and negro male, acts of sodomy and intercourse, Vivitar projector

/s/ *JAH*

Booth #15, One film depicting two white females acats of sodomy Urban Industries Projector

Booth #16, One film depicting one white male and white female, acts of sodomy and intercourse, Vivitar projector

Booth #17, One film depicting acts of sodomy, masturbation and intercourse in an animated cartoon of Snow White and the Seven Dwarfs, Vivitar projector

Booth #18, One film depicting white male and white female wherein the white female is covered by various food items which appear to be of a banana split, Vivitar projector

Booth #20, One film depicting three white males, acts of sodomy, one Vivitar projector and coin box.

Booth #21, One film depicting white male and white female, acts of sodomy and intercourse with sound videotronic projector and coin box and speaker.

Booth #22, One film depicting a negro female and white male, acts of sodomy and intercourse with sound videotronic projector and coin box.

Booth #23, One film depicting white male and white female, acts of sodomy and intercourse with sound videotronic projector and coin box and speaker.

Rear Room #1 on left—
White male, white female on one film, and two negro females and white male on second film, videotronic sound camera and Vivitar projector

Rear Room #2 on right
One film, two white females, one white male, titled "Eat Me Good", depicting acts of sodomy and intercourse and one film showing two white males youths acts of masturbation and sodomy, videotronic sound camera and Vivitar projector, and black wood box with coin machine attachment.

/s/ *JAH*

Front Counter Area

Target Systems, Super 8 self-contained cartridge movie projector with sound and one cartridge showing white male white female, acts of sodomy and intercourse

2 JAYARK Tricon Super 8 self-contained cartridge movie projector with sound with 3 cartridges depicting acts of sodomy and intercourse

10 Mannikins displaying sexually explicit items of clothing

1 Accu-jack unit

/s/ *JAH*

The following films from the Front Counter Display Area:

Dynamite #9
Donimant Trio Part B
Lusty Girls #2
Golden Shower #4 & #3
Kinky K ds KK-4 & KK-6
Sexciting #5
Hot Heroines HHF 1 & 3
Sensous Strangers #121 and 126
Bottons Up #6
Sound #43 and 42 and 45
#4 SUP COL
Pent House #PP17 and 21
Smokers SM 3 (2)
Slice of Cunt
Cock Party
School Girls, #1, reg col
Tricks and Dicks
Jade #3 and #6
The Rabbit and the Fox
Piggy and the Cat
Clitoria
Orgy EROTICA (2)
Fuck or Else
Tampax Freak
Swinging Maid T.W.5
Lunny Birds
Fit for a Queen (2) #3 and #1
Oriential Sex Pot (2)
Sensuous Strangers #123

Sensation Sex #2
Seduced #7 and #10
Satan #1 (2), #3; #4; #5; #6 (2) and #9
Porno Classics PC2
Valentino Series Lez Delivery
Rear End Frolics Presents #1, #2, #3, #5 and #4
Cream C6; C7; C8; and C9 (3)
White Pussy TF1 (2)
Playmate #26
Oz Films, Slave Fucking
Oz Films #'s 76, 77, 78, 79
Screw SP 25; 34; 26, (2); 27; 28; 32; 36
Hollywood Swingers HS25 and 26
All the Way #1, (2) and #4
Wet and Warm
Junior Cadets #2, 3, 4 and 5
Vamps "N" Tramps (3)
The Grovers TGF (2)

/s/ JAH

Sex Machines SM 5 and 6
Pretty Boy #'s 1, 2, 5, 9 PB13, PB15, PB16
FUCKED
Sensation Sex
Sensation Sex, Part I (2) Part II
Plunge I
Fit for a Queen #4 and 5
Domino #1 and 4
Kinghts of the Night KNF 1, 4, 5 and 6
Orange Blossom #6, 7 (2), 9, 10 (2)
Sensuous Strangers #129
Dream Boy (2)
All the Way #2 and 4

Hot Heroines HHF5
Freak Out M-1; M-2; M-3; V 3 (2)
Action #1 (2); #3, #4 (2) an #6
The Sex Servants Part II Master of the House
Jocks, #1, 23, 4, 5&6

The following films are from the rear counter display area:

This is a Lasse-Braun LB37 (white box's 6)
Linda and Duke
Green Box Depicting Girl and Eel
Kiniks KSF1, 2, 4
Sue and Duke
Piggy and the Cat
Sex Machines SM1
Pretty Boy PB16
Pretty Boy 3 reels taped together
Three white boxes marked Male special

/s/ JAH

Color Climax #5
Jocks Scoring a Basket
Junior Cadets ICF1
Slice of Cunt
Screw SP33 (2) and #37
Sensation Sex Part I
Fahrenheit 220 #'s F1, F2 & F6 (2)
Hand Fucker #1710
French Treasers #104
Canddle Light #3
Porno Classics #'s 9, 10, 11, 12, 13, 14, 15&16

/s/ JAH

#9 COL (red and green box)
Flash Point #'s 1, 2, 3, & 6
Homemade Love
Sex Bizarre #6
Pent House #PP18
Fahrenheit 220 F4
The Sex Lovers #2 and 3
Wilder Lust #8
Chicks and Dicks #'s 1, 2, & 5
Lollipop #1, 3, 4, 5, & 7
Hot Stuff 3, 5 & 6
Parisina #37(2); #38(2)
Valentino Series (Hot dog man (2) & Cocktails for Two, Stocking Rape)
Orange Blossom #7; 8; & 9; 10(2)
Red Plastic Box s #'s 1(3); #3(4)
Continental Classics, Series 1 #2 and #4, Series 2, #7, #9, #10.
2 Sealed packages consisting of two reels containing Sex Deviates #7 and X-Rated #4
Golden Shower #5
Paris Nights #3
Sex Citing #3
Lesbian Dominatrixes Part A
Dog Tamer K 9 PART I (2); Part II (4)
Back Door (2)
DW 58
Thrill Seekers #2
Shocking #'s LB40(2); 41 and 42
Danish Films #1002(2) and 1004
Action #1, 2, 4 & 6
Sex, American Style #'s 1(2), #3, 4, 5, 6, 7, 8, 9, & 10

Venutre #'s 4, 5, 6, 7, 8
Hollywood Swingers #'s HS23, 25, 27,
The Devil in Miss Jones
The Devil in Miss Jones, Part I, II, III & LVKV
X RATED 3
The Collection #24, (2); 23(2); 22 and 21
Dominio #'s 2, 3 & 5
Dynamite #'s 1(2); #2(2); #5(2) #6(2), #8
Thrill Seekers, #'s 1, 3, 4, 5 & 6
Pretty Boy #'s 1(2); #2 and #5
Fit for a Queen #2
Plunge #1, #2(3)
Freak-Out M-2(2)
Knights of the Night KKF3(2) 5 and 6
Freak Out M-1 (2)
Fuck Tastik #'s 1(2); 2(2); 3(2); 4(2) and 5
Heads Up Action #'s 1-10
Heads Up Action (whiteboxes #'s 1-10)
America #'s 1-6
KAMA SUTRA #'s 1(2); #3(2) 3 and 4
Lust Films, #'s 1(2); 2(2); 3(2); 4(2) and 5(2)
The Groovers, #'s TGF #1(2); #2(4); #3(3); #4(4) #5(3), #6(2)

/s/ JAH

Tenill Presents Quade Part I
San Francisco Pick-Up (2)
Child Molester
Country Counsins (2)
Pretty Pets (2)
Teenage Trip

D & W Mink 7,
1 sealed reel marked color

1 reel marked play mate #26-r-8
1 reel marked "The Collection" #22

Magazines

Party Girls 1 & 2
All Color Special #1, (3); #2(2); #3; #4(3)

16 mm film

Black Angus
This is the Life
Lesbian Paradise
Hindu Life
Cocks Dancing School
R-3 Club
Jade #2 and 4 8mm
Golden Shower #2 8mm
TL3 8mm
1 reel—Vamps 8mm
1 red reel 8mm no title
1 reel 8mm in black box initialed F.L.
3 reels of film in paper bag marked "Shit"

Magazines

The Oriental Bride (2)
Reward from Teacher
Smnall Town Beauty
Gayboy Volume 1, #2
Leather Bondage techniques Vol. 3
OOH! #11, (2)
Erotic Humor Vol. 2 #1
Love #34 (2)

/s/ JAH

8 plastic bags and 1 large cardboard box containing assorted items of obscene material for over the counter sale

1 obscene ring toss game

1 box containing business records

2 paralyzer tear gas aerosol chemical canister

/s/ *JAH*

This warrant must be executed not more than 10 days after the issuance and any property seized pursuant hereto shall be returned and delivered to the Court without unnecessary delay.

The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law.

DATED: Goshen, New York
June 25, 1976

/s/ JOHN O'CONNOR
Local Justice

NEW YORK STATE POLICE
SEARCH AND SEIZURE
RECEIPT AND INVENTORY

LOCAL CRIMINAL COURT

Town of Wawayanda

COUNTY OF ORANGE, N.Y. *ss.*:

I swear that the following is a true and detailed inventory of all property taken by me on the warrant filed herewith:

The following listed items on attached Fourteen (14) pages per direction Town Justice JOHN O'CONNOR, in search warrant issued June 25, 1976.

/s/ J. A. HURBANEK

Subscribed and sworn to before me
this 26th day of June, 1976.

/s/ JOHN O'CONNOR,
Town Justice

The following items were seized from the Adult Store on Route 17 pursuant to the execution of a search warrant issued on June 25, 1976:

WALL "A"

1. Pretty #1 (2)
2. Hard Reamers, Volume 1 #1 (1)
3. Sex Act, Book 1 (1)
4. Orgy Too (1)
5. First Me (2)
6. Special Gift (2)
7. Hard-On Heavan (1)
8. Sex and Ecstasy (3)
9. Playful Lovers (2)
10. Hard Act, Volume 1 #1 (1)
11. Primer for Sexual Education Volume 8 (1)
12. Sex'ionary Volume 1 #2 (1)
13. Enrapt Hairs Volume 1 #1 (1)
14. Lips and Tongue Sex (1)
15. Carnal Knowledge Volume 2 #3 (1)
16. Amour (6)
17. Carnal Book I (2)
18. Sexual Release Volume 1 #1 (1)
19. Hot and Horny (1)
20. Literotica Volume 1 #1 (2)
21. Erotiton Book II (2)
22. Party Girl, #2 (1)
23. Sluts (2)
24. Nique (2)
25. Sex Seekers Volume 1 #1 (1)
26. Valerie (1)

27. Afro Fuck Interracial (1)
28. Piss Ass (2)
29. Interplay Volume 1 #3 (1)
30. Orgasm Book I, (2)
31. All Color Poker (2)
32. Sex Strokers Volume I, #1 (2)
33. Sex On Campus (2)
34. Teach Me to Take It (1)
35. Sex Crique (4)
36. Real Sex (4)
37. The American Sex Scene Volume 4 (1)
38. The American Sex Scene Volume 3 (3)
39. Sizzling Hot (1)
40. Pleasure Book 2 (2)
41. Fuckum (3)

/s/ JAH

42. Sex and Swinging Single Volume 1 Book 1 (2)
43. Cherry Pie Volume 1 #1 (2)
44. The Good Life Volume 1 #2 (1)
45. Single Swingers (5)
46. Answers Volume 1, #3 (1)
47. Sex Scope Volume 1, #4 (1)
48. Sex in America Book 3 (1)
49. Electra Volume 6 #2 (1)
50. Sexual Pursue, #2 (2)
51. Response Volume 5 #1 (2)
52. Sex World, Book 5 (1)
53. Women Together, Volume 1 #2 (1)
54. Hell's Bedroom (4)
55. Sex Drive #5 (1)
56. Sex and Pornography #4 (1)

57. Sex and Pornography #1 (1)
58. Hot & Hung (1)
59. Weekend with the Boss (2)
60. The Sex Scene (1)
61. A Dream Cums True (3)
62. Toppers Volume 1 Book 1 (1)
63. Sexways Volume 1 #1 (1)
64. Dreamy Sisters (4)
65. A Model Story (1)
66. Informed #3 (1)
67. Informed #7 (1)
68. Informed #5 (3)
69. Sex and the Single State Volume 1 #1 (1)
70. Fly Her Friendly Thighs (1)
71. Love and Lust (1)
72. Suckfest (3)
73. The Devil Made Me Do It Volume 1 #3 (6)
74. Get Down With 3 (1)
75. Prince #10 (5)
76. Partner #2 (3)
77. Selecta (2)
78. Prince #11 (2)
80. Anal Sex #12 (1)
81. Con Amore #9 (1)
82. Private #20 (1)
83. Private #18 (2)
84. Dream (1)
85. Climax #208 (1)
86. Climax #207 (1)
87. Prince #8 (3)
88. Danish Games Volume 1 #7 (1)

89. Partner #1 (1)
90. Partner #4 (5)
91. Ero #5 (1)
92. Ero #6 (1)

/s/ JAH

Books located on center table:

1. Call Boy #5 (1)
2. Virgin Territory (2)
3. The Oriental Split #1 (1)
4. Whoring Hitchhikers Volume 1 #2 (1)
5. Teen Teasers Volume 1 #2 (1)
6. Naked (1)
7. Mother Truckers Volume 1 #3 (1)
8. Throb (6)
9. Switch Volume 1 #1 (1)
10. Hump #5 (15)
11. World of Love & Sex Book 7 (1)
12. Close-Up Volume 2 #5 (1)
13. Primates Volume 1 #1
14. Climax (5)
15. The Many Faces of Philbert Foxhunt (9)
16. Swing #5
17. Erotic Humor Volume 2 #2 (4)
18. Mike's Muscle
19. Greek Lightning [Straight to the End #1 (3)] separate books
20. Coming My Way Stud #1 (2)
21. Les Love Volume 1 #1
22. Leather Bondage Techniques Volume 1
23. The Cruiser Volume 3
24. Visitor's Welcome Volume 1 #1 (2)

25. The Long Horns Volume 1 #1
26. Blast Off #2
27. My-O-My Volume 2
28. Garden Tools Volume 1 #1
29. Humpy Jocks First Issue
30. Finger Licking Good
31. Keep On Coming stud #4
32. Chain Male #3
33. Strangers In the Night #1
34. Head Strong
35. Meat Rack Volume 1 #1
36. Caught Hot-Handed Volume 1 #1
37. Swinging in the Rain (2) Far Out #2
38. The Best of Tom #1
39. I'll Pay by the Inch #1
40. Modern Girls #1
41. Enjoy #1
42. Reflections of Youth
43. Sock it to Me (3)
44. The Gay Cure
45. Chicken Delite (3)
46. Aces Volume 1 #1
47. Prickly Heat Stud #2
48. Stud Time Issue 1
49. Chains

/s/ JAH

50. Combo #1
51. Flesh Parad
52. Mod Age Volume 1 #4
53. Bodies in Bondage Volume 1 #3
54. Every Body Needs Meat Stud #3

55. Heavy Hitters Volume 1 #1
56. Cock Crazy Kids (3)
57. The Best of Tom #2
58. Temptin Teens
59. Genitalia
60. The Phallus

Books located on rear wall:

1. Blast Off #2
2. Coming Up Strong #2
3. Greek Lightning #4
4. Blast Off #1
5. Hard to Handle #2
6. Tongue 'n Cheek
7. The Defiled Facist #4
8. Coming My Way Stud #1
9. Man's Best Friend Kinks #5
10. Keep on Coming Stud #4 (2)
11. Cock Crazy Kids
12. Hard Up House Boy
13. Straight to the End #1
14. Making It Big San Francisco
15. Virgin Territory 2
16. Colorviews (2)
17. Take it as it Comes
18. Prickly Heat Stud #2
19. The New Dudes Volume 1 #2
20. Try it For Size
21. Leather Bondage Techniques Volume 4
22. The Cruiser Volume 3
23. Cock Rings, Chains & Things (2)

24. Hustling Dudes Volume 1 #1
25. Chicken Delite
26. Tweak
27. I'll Pay By the Inch #1
28. Body Motions
29. Swinging in the Rain
30. The Bigger They Come Volume 1 #1
31. Erotic Hands (2)
32. Boy Chicks Volume 1 #1

/s/ *JAH*

33. Meat Rack Volum 1 #1
34. The Intruder
35. Brutal Birthday—Knights of the Night #2

Books behind front counter in boxes:

1. Private #22
2. Private #18
3. Private #21
4. Teenagers Loving Weekend Volume 1 #1
5. Succotash Vol. 1 #2
6. Answers Vol. 5 #3
7. The Sinners
8. Curious #6
9. Marriage Carousel
10. Enjoy
11. Full Swing
12. Sex Reflection #5 Vol. 2 #1
13. Sticky Fingers Vol. 1 #1
14. Mated #2
15. The Paperboy LLP-2019

16. Response Vol. 4 #4
17. Pleasure Vol. 1 #2
18. Teacher's Pets SLP/1008
19. Auntee Loves Me
20. Sexscope
21. Substitute Wife #635
22. Teenage Sandwich T-202
23. Sexual Behavior and the Law Vol. 1
24. Hold His Cock T-203
25. Manuals of Sex Magic OSL-9617
26. A Study of Wife Swapping Series 1002

/s/ *JAH*

Books behind front counter:

1. Liquid Plumber Kinks #6
2. Strangers in the Night #1
3. Mandate Vol. 1 #1
4. Drawn and Quarters #1
5. Gay Studs Vol. 5 #1
6. Afro Fuck
7. Feminine Hygiene and Masturbation
8. Naked Nurses Vol. 6 #4
9. Unnatural Sex Acts
10. Trusting Couple #1 Vol. 1
11. Games People Play
12. Orgasm Vol. 1 #1
13. The Teacher's Wife CCP/3013
14. Stick It In
15. Young Hard Studs Vol. 1 #1
16. Hard Heads
17. Hard Up Houseboy
18. The Sinners

19. Stiff Pricks
20. Hot and Horny Vol. 1
21. Head On
22. Solo Sex Female Masturbation Vol. 1
23. Sex Drive #6
24. Dirty Martha
25. The Fucking Freaks
26. Tongue Lashing Ball #4
27. Case Book Vol. 2 #1
28. Get Down with 3
29. Fuck Free
30. Orgy #3 #30
31. Ankh Vol. 6 #2
32. Sexualis Vol. 1 #1
33. Explicit Vol. 1 #2
34. Swingers #31 #3
35. Right-On
36. Triple Headers
37. Around the World
38. Hookers #1
39. Sex, Singles & Society #9630
40. Animal 14

/s/ JAH

The following items seized from projector booth and room:

Booth #1: 1 Film depicting two white females, 1 white female, act of sodomy and intercourse—Bolex—18-5L Projector

Booth #2: 1 film depicting a white male and a Negro female act of sodomy and intercourse—Vivitar Projector

Booth #3: 1 film depicting white male and white female acts of sodomy and intercourse—Vivitar Projector

Booth #4: 1 film depicting white male and white female acts of sodomy and intercourse—Vivitar Projector

Booth #5: 1 film depicting white male and white female, acts of sodomy and intercourse—Vivitar Projector

Booth #6: 1 film depicting white male and white female, acts of sodomy and intercourse—Vivitar Projector

Booth #7: 1 film depicting two white females, acts of fingering and use of dildos—Vivitar Projector

Booth #8: 1 film depicting 2 white females, and white male, acts of sodomy and intercourse—Vivitar Projector

Booth #9: 1 film depicting a white male and white female, joined by second white male, acts of sodomy and intercourse—Vivitar Projector

Booth #10: 1 film depicting two white males, acts of sodomy Vivitar Projector

Booth #11: 1 film depicting white male and white female joined by another white male and white female, acts of sodomy and intercourse—Bolex 18/5L Projector

Booth #12: 1 film depicting white female and white male, acts of sodomy and intercourse—Vivitar Projector

Booth #13: 1 film depciting white female and white male, acts of sodomy and intercourse—Urban Industries Projector

Booth #14: 1 film depicting two white females and Negro male, acts of sodomy and intercourse—Vivitar Projector

/s/ JAH

Booth #15: 1 film depicting two white females, acts of sodomy Urban Industries Proj.

Booth #16: 1 film depicting white male and white female, acts of sodomy and intercourse—Vivitar Proj.

Booth #17: 1 film depicting acts of sodomy, masturbation, and intercourse in an animated cartoon of "Snow White & the Seven Dwarfs"—Vivitar Proj.

Booth #18: 1 film depicting white male and white female wherein the white female was covered by various food items which appear to be like a banana split.—Vivitar Proj.

Booth #20: 1 film depicting three white males, acts of sodomy 1 Vivitar Proj. & Coin Box

Booth #21: 1 film depicting white male and white female, acts of sodomy and intercourse with sound-Videotronic Proj. & Coin Box & Speaker

Booth #22: 1 film depicting Negro female and white male, acts of sodomy and intercourse with sound, Videotronic Proj & Coin Box

Booth #23: 1 film depicting White male and white female, acts of sodomy and intercourse with sound—Videotronic Proj Coin Box & Speaker

/s/ *JAH*

Rear Room #1 on left: white male white female, on one film and two negro females and white male on second film—Videotronic Sound Camara & Vivitar Proj.

Rear Room #2 on right: 1 film 2 white females 1 white male entitled "Eat Me Good" depicting acts of sodomy

and intercourse and 1 film showing 2 white male youths, acts of masturbation and sodomy—Videotronic Sound Camera—Vivitar Proj.—Lock Wood Box with Coin Machine Attachment

Front Counter Area: Target System Super 8 Self contained cartridge movie proj. with sound and 1 cartridge showing white male, white female, acts of sodomy and intercourse.

/s/ *JAH*

Front Counter Area: 2 Jayark Tricom Super 8 Self Contained Cartridge Movie Proj. with sound with three cartridges, depicting acts of sodomy and intercourse.

10 mannikins displaying sexually explicit items of clothing

1 accu-jac unit

/s/ *JAH*

The following films from the front counter display area:

Dynamite #9
Dominant Trio Part B
Lusty Girls #2
Golden Shower #4 & #3
Kinky Kids KK-4 and KK-6
Sexciting #5
Hot Heroines HHF 1 & 3
Sensuous Strangers 121 & 126
Bottoms Up #6
Sound #43 & 42 & 45
#4 Sup Col
Penthouse #PP17 & 21

Smokers SM-3 (2)
Slice of Cunt
Cock Party
School Girls #1 Reg Coll
Chicks & Dicks
Jade #3 & 6
The Rabbit and The Fox
Piggy & The Cat
Clitoria
Orgy Erotica (2)
Fuck or Else
Tampax Freak
Swinging Maid TW 5
Looney birds
Fit For a Queen No. 1 & 3
Oriental Sexpot (2)
Sensuous Strangers #1, 2, 3
Sensation Sex No. 2
Seduced #7 & #10
Satan #1 (2 copies); #3; #4; #5; #6 (2); #9
Porno Classics PC-2
Valentino Series Lez Delivery
Rear End Frolics Presents #1, #2, #3, #5 & #4
Cream C6, C7, C8, C9 (3)
White Pussy TF1 (2)
Playmate #26
Oz Films, Slave Fucking
Oz Films Presents, #76, 77, 78, & 79
Screw SP25 & 34, 26, (2), 27, 28, 32, & 36
Holywood Swingers HS-25 & 26
All The Way #1 (2), 4
Wet & Warm

Junior Cadets #2, 3, 4, & 5
Vamps "n" Tramps

/s/ JAH

The Groovers TGF #1 (2)
Sex Machines SM5 & 6
Pretty Boy #1, 2, 5, 9, PB13, PB15, & PB16
Fucked
Sensation Sex
Sensation Sex Part 1 (2) & Part 2
Plunge 1
Fit For a Queen No. 4 & 5
Donimo No. 1 & 4
Knights of the Night KNF 1, 4, 5, & 6
Orange Blossom #6, 7 (2), 9, 10, (2)
Sensuous Strangers #129
Dream Boy (2)
All the Way #2 & 4
Hot Heroines HHF5
Freak Out M-1, M-2, M-3, V-3 (2)
Action #1 (2), 3, 4 (2), 6
The Sex Servants Part 2, Master of the House
Jocks #1, 2, 3, 4, 5, & 6

The following films from the rear counter display area:

This is A Lasse Braun—LB37 (White Boxes) (6)
Linda & Duke
Green Box depicting girl and Eel
Kinks KSF1, 2, 4, & 6
Sue & Duke
Piggy and the Cat
Sex Machines SM 1

Pretty Boy PB 16
Pretty Boy (3 reels taped together)
3 White Boxes marked Male Special
Color Climax #5
Jocks—Scoring a Basket
Junior Cadets ICF 1
Slice of Cunt
Screw SP 33, (2), #37
Sensation, Sex Part 1
Fahrenheit 220 #F1, F2, & F6
Handfucker No. 1710
French Teasers No. 104
Candlelight No. 3
Porno Classics No. 9, 10, 11, 12, 13, 14, 15, & 16
No. 9 Reg Col (Red & Green Box)
Flash Point # 1, 2, 3, & 6
Home Maid Love
Sex Bizarre #6
Penthouse #PP18
Farenheit 220 F4
The Sex Lovers, #2, 3

/s/ JAH

Wilder Lust #8
chicks & Dicks 1, 2, & 5
Lollipop #1, 3, 4, & 5, & 7
Hot Stuff 3, 5, & 6
Parisiana #37, (2 copies) #38 (2)
Valentino Series (Hot Dog Man (2)) Cocktails for Two & Stocking Rape
Orange Blossom #7, 8, 9, 10(2)
7 Red Plastic Boxes #1 (3), 3, (4)

Continental Classics Series 1, #2 & 4, Series 2, #7, 9, 10
2 Sealed Packages consisting of 2 reels containing sex deviates, #7 & X-rated #4
Golden Shower #5
Paris Nights #3
Sexciting #3
Lesbian Dominatrixes Part A
Dog Tamer, K9, Part 1, 2 films; Part 2, 4 films
Back Door (2)
DW58
Thrill #2
Shocking No. LB40, (2), 41, 42
Danish Films #1002 (2), 1004
Action #1, 2, 4, 6
Sex American Style Nos. 1 (2), 3, 4, 5, 6, 7, 8, 9, 10
Venture No. 4, 5, 6, 7, 8
Hollywood Swingers No. HS 23, 25, 27
The Devil in Miss Jones
The Devil in Miss Jones Parts 1, 2, 3, 4
X rated 3
The Collection #24, (2), 23, (2), 22, 21
Domino #2, 3, 5
Dynamite #1, (2), #2(2), 5 (2), 6 (2), 8
Thrill Seekers #1, 3, 4, 5, 6
Pretty Boy #1, (2), 2, & 5
Fit For a Queen #2
Plunge #1, 2, (3),
Freak Out M-2 (2)
Knights of the Night KNF3 (2), 5 & 6
Freak Out M-1 (2)
Fuck-tastik #1,(2), 2,(2), 3(2), 4(2), & 5
Heads Up Action #1 through 10

Heads Up Action (white boxes) #1 through 10
America #1-6
Kama-Sutra #1(2), 2(2), 3, & 4
Lust Films #1(2), 2(2), 3(2), 4(2), 5 (2)
The Groovers #TGF #1(2), 2(4), 3(3), 4(4), 5(3), 6(2),

/s/ *JAH*

Tenill Presents Quad Part 1
" " San Francisco Pick Up (2)
" " Child Molester
" " Country Cousins (2)
" " Pretty Pets (2)
" " Teenage Trip
D & W Mink 7
1 Sealed Reel Marked "Color"
1 Reel Marked "Playmate" #26-R-8
1 Reel Marked "The Collection" #22

Magazines:

Party Girls #1 & 2
All Color Special #1(3), #2(2), #3, #4(3)

16 MM Films:

Black Angus
This is the Life
Lesbian Paradise
Hindo Life
Cocks Dancing School
R-3 Club
Jade #2 & 4 (8mm films)
Golden Shower #2 (8mm film)

(8mm) TL3
" 1 Reel—Vamps
" 1 Red Reel
" 1 Reel in black box initialed F. L.
" 3 Reels in paper bags marked "Shit"
"

Magazines:

The Oriental Bride (2)
Reward from Teacher
Small Town Beauty
Bayboy Vol. 1 #2
Leather Bondage Techniques Vol. 3
Ooh #11 (2)
Erotic Humor Vol. 2 #1
Love # 34 (2)

/s/ *JAH*

8 plastic bags & 1 large cardboard box containing assorted items of obscene material for over-the-counter sale

1 obscene ring toss game

1 box containing business records

2 paralyzer tear gas aerosol chemical cannisters

/s/ *JAH*

Notice of Motion

LOCAL CRIMINAL COURT:

TOWN OF WAWAYANDA

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

ALEXANDER MANDAKIS, *et al.*,

Defendants.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ALEXANDER MANDAKIS, and upon all the pleadings and proceedings heretofore had herein, the undersigned, as attorneys for Defendants ALEXANDER MANDAKIS and LOJI SALES, INC., will move this Court, at the courthouse thereof in the town of Wawayanda, County of Orange, State of New York, at a term thereof, on the 30th day of July, 1976, at 7:30 p.m., or as soon thereafter as counsel can be heard, for an order suppressing all of the evidence seized in the above entitled action and returning them to the said Defendants forthwith on the grounds that all of said material was seized in violation of the rights of the said Defendants under the First, Fourth and Fourteenth Amendments of the United States Constitution and the comparable provisions of the New York State Constitution, and granting to

said Defendants such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
July 29, 1976

Yours, etc.

KASSNER & DETSKY, P.C.
Office and Post Office Address
122 East 42nd Street
New York, New York 10017
Telephone: 212 682-6600
Attorneys for Defendants
Loji Sales, Inc. and
Alexander Mandakis

To: District Attorney
Orange County
State of New York

Affidavit of Alexander Mandakis

LOCAL CRIMINAL COURT:

TOWN OF WAWAYANDA

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

ALEXANDER MANDAKIS, *et al.*,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ALEXANDER MANDAKIS, being duly sworn, deposes and says:

On June 25, 1976, at approximately 11:00 in the morning, over a dozen state troopers, various district attorneys, and Judge O'Connor of the Town of Wawayanda, entered the adult bookstore on Route 17M in New Hampton, New York ordered customers in the store to leave the store, placed me under arrest, and commenced to search the entire store and seized approximately $15,000.00 worth of merchandise from the store.

I was the clerk employed in the store at the time of the said seizure. The store is engaged in the sale and exhibition of books, magazines, films, motion picture projectors, rubber goods, lotions, pills, clothing, most of which is expressive material protected by the First Amendment. By virtue of the sexually oriented theme of the materials sold

and exhibited in the store, admission to the store is restricted to forewarned consenting adults over the age of 21 years. A sign on the front door of the store reads as follows:

> "Stop—you must be 21 years or older—educational and medical literature of a sexual nature—if material herein offends you please do not enter."

After entering the store and closing it to business, the Judge, District Attorneys, and policemen commenced to tear the cellophane wrappers off of almost all of the books and perused the books. They ordered me to activate the switch which allowed them to view the motion picture films exhibited in the coin operated film machines without inserting coins. They thereupon viewed the films. They went through all of the magazines in the store. The Judge would look at each book and magazine for a few seconds and a man who accompanied him would list the names of each such book and magazine. The Judge started looking at the films exhibited in the coin operated film machines with the man accompanying him listing the names of each.

In the course of this raid, the police tore out four money boxes containing the receipts of the coin operated film machines, damaging the enclosures. They tore out wires from the sitting room walls, broke the glass on projector, pulled a five foot unit off the wall, threw books and magazines around the premises, heaped cellophane covers throughout the premises, and then seized approximately $15,000.00 worth of merchandise including all of the films in the store, all of the projectors held for sale in the store, all of the projectors used in the coin operated film machines, all of the sexually explicit books and magazines,

all of the clothes mannequins with the lingerie on them, all of the rubber goods in the store with the exception of prophylactics, some of the lotions, some of the pills, and some of the simulated books.

After the search was completed, there was delivered to me a search warrant which allegedly listed all of the material seized from the store pursuant to the said search. The said search warrant is annexed hereto and made a part hereof. Also annexed hereto is the affidavit of Johannes A. Hurbanek which allegedly formed the basis for the issues of the aforesaid search warrant. In the said search warrant the said Johannes A. Hurbanek alleges that he purchased two reels of film entitled "Linda and Duke" and "Four for Dinner", both allegedly obscene. It should be noted that the search warrant issued pursuant to the aforesaid affidavit directed in items 1 and 2 thereof the search of the premises and the seizure of the two said films. I am advised by my attorneys that the possession by the prosecuting authorities of two said films obviates the necessity of and militates against the seizure of the same films since the evidence was already in possession of the prosecuting authorities and any further seizure of the same material constituted an attempt to suppress its dissemination prior to a final adjudication of the obscenity thereof, all in violation of the First and Fourteenth Amendments of the United States Constitution.

I am further advised by my attorneys that all of the material mentioned in Item 3 of the warrant was subjected to an illegal search prior to the issuance of the warrant in violation of the First and Fourteenth Amendments. I am further advised by my attorneys, that the seizure of virtually all of the expressive material in the store, including multiple copies of each item, constituted a massive suppressive seizure prior to a final determination of the obscenity of such material, in violation of the First and Fourteenth Amendments. I am further advised that the seizure of the projection equipment used to exhibit the films in the store violated basic First Amendment principles against suppression and the seizure of rubber goods, mannequins, lingerie, projectors held for sale, lotions, and pills, constituted a violation of due process by virtue of its confiscation of non-contraband items without compensation.

By virtue of the foregoing, it is respectfully submitted that plaintiff's motion for suppression of all such items and return thereof be ordered forthwith.

/s/ Alexander Mandakis
Alexander Mandakis

Sworn to before me this
30 day of July, 1976

/s/ John O'Connor, T.J.

Defendants' Memorandum of Law on Motion to Suppress

LOCAL CRIMINAL COURT:

TOWN OF WAWAYANDA

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

ALEXANDER MANDAKIS, *et al.*,

Defendants.

THE FACTS

From the affidavit of Alexander Mandakis, the affidavit of Johannes A. Hurbanek, and the search warrant of the Hon. John O'Connor, the following facts become apparent and uncontestable. On June 20, 1976 a police officer entered the store of defendants and purchased two 8 millimeter reels of motion picture film entitled "Linda and Duke" and "Four For Dinner". Believing the said films to be obscene and typical of other films, magazines and other objects in the store, the said police officer submitted an affidavit to Judge John O'Connor, requesting the Judge to accompany him in the execution of a warrant to be issued for the seizure of "additional material present in the aforedescribed premises . . . possessed in violation of the law and therefore subject to seizure." The said affidavits further requested that the court issue a search warrant for the seizure of the two films already purchased by the said police officer and for "any other material that the court

may independently determine upon viewing to be possessed in violation of Article 235 of the Penal Law."

Thereafter, and on June 25, 1976, a massive raid and search was conducted at the premises by the Judge, various officials of the District Attorney's Office, and over a dozen police officers. The details on the said raid are more fully set forth in the affidavit of Mr. Mandakis. Suffice it to say that it appears as if no warrant was issued until after the search of the premises and that the search was conducted without any legal authority whatsoever. It cannot be urged that the search and seizure was necessary to procure evidence in connection with the arrest of Mr. Mandakis since the two films specifically mentioned in Items 1 and 2 of the warrant were already in the possession of law enforcement officials and could have served as a basis for a criminal prosecution for obscenity. Any search and seizure of additional copies of the said material would have constituted a suppressive seizure as opposed to an evidentuary seizure. It cannot be urged that the search and seizure was incidental to an arrest in view of the basic Fourth Amendment mandates of *Chimel* v. *California*, 395 U.S. 752. It cannot be said that the search was pursuant to a lawfully issued warrant since the search uncovered all of the material mentioned in the warrant with the exception of two films previously purchased by the police officer. With respect to this additional material, including the seizure of multiple copies of a single item, there can be no doubt that the seizure was intended to be and was in fact a massive suppressive seizure of virtually all of the expressive material in the store in clear violation of such fundamental First Amendment pronouncements of the Supreme Court as those contained in *A Quantity of Books*

v. *Kansas,* 378 U.S. 205 and *Marcus* v. *Search Warrants,* 367 U.S. 717. It cannot even be said that any of the search and seizure conducted at the premises or the issuance of the warrants was supported by any prior judicial scrutiny as required by *People* v. *Heller,* 29 N.Y. 2d 319, since there is no indication that even the two films purchased by the police officer were ever viewed by Judge O'Connor. As to the seizure of projection equipment used in the exhibition of film in the coin operated film machines, there could be no justification for such seizure in the light of basic First Amendment principles. *Near* v. *Minnesota,* 283 U.S. 697. As to the seizure of non-expressive material held for sale in the ordinary course of trade, under no stretch of the imagination could such projectors, mannequins, clothes, lotions, pills, and rubber goods be considered contraband in violation of the obscenity laws of the State of New York since such material does not constitute expressive matter which portrays sexual activity.

It cannot be overemphasized that most of the books in the store were wrapped in cellophane and could not be subjected to judicial scrutiny without the performance of a search and seizure, to wit, the tearing of the cellophane. The issuance of a warrant after the search and seizure could not conceivably justify the search and seizure. When the raiders entered the store, closed it for business, arrested the clerk, there had been neither prior judicial scrutiny of the material mentioned in the subsequently issued warrant nor probable cause for the issuance of the said warrant. The search and seizure that followed such entry was therefore illegal in violation of the First, Fourth and Fourteenth Amendments of the Federal Constitution.

THE LAW

Prior to the decision of the New York Court of Appeals in 1971 in the case of *People* v. *Heller,* 29 N.Y.2d 319, it was the law in this jurisdiction as in most other jurisdictions throughout the United States that there could be no seizure of expressive material without a prior adversary hearing and judicial determination of the obscenity vel non of such material. *Astro Cinema Corp.* v. *Mackell,* 422 Fed. 2d 293; *Bethview Amusement Corp.* v. *Cahn,* 416 Fed 2d 410, cert. denied, 397 U.S. 920. With the decision in *Heller,* it became the law of the State of New York that an evidentiary seizure of one copy of expressive material could be founded upon the prior judicial scrutiny of such material and determination of the obscenity thereof. This decision of the Court of Appeals was upheld by the United States Supreme Court in *Heller* v. *New York,* 413 U.S. 483 which upheld the New York procedure of prior judicial scrutiny as a condition precedent to an evidentiary seizure of a single copy of expressive matter but made it clear that prior judicial scrutiny could not support a suppressive seizure. The court stated at page 492:

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the

> obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the Trial Court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned."

From the foregoing, it is abundantly clear that even prior judicial scrutiny could not support the massive seizure which took place in defendant's premises. It is also apparent that the seizure must follow the judicial scrutiny, not, as in the instant case, precede it.

If the decision in our Court of Appeals and in the United States Supreme Court in *Heller* were not sufficient to establish the basic principle, *People* v. *Abronovitz,* 31 N.Y. 2d 160, clearly does so. In that case, as in the instant case, a police officer brought before a Judge certain magazines which he had lawfully acquired, requesting that the Judge issue a search warrant for the seizure of similar material possessed in and sold from the store. The warrant was issued and the police seized over 1,000 magazines and calendars from the defendant's premises while arresting the defendant on obscenity charges. Citing *A Quantity of Books* v. *Kansas,* supra, and *Marcus* v. *Search Warrant,* supra, as well as *People* v. *Heller,* supra, our Court of Appeals suppressed and reversed.

In the instant case, the only difference between the *Abronovitz* seizure and our seizure is that the Judge accompanied the police officers in conducting the warrantless

illegal search and seizure. In *Abronovitz* there was a warrant issued by a Judge preceding the search and seizure. In the instant case there was not even such a warrant. If it is the position of the People that the accompaniment of a Judge in the making of an illegal search and seizure turns what would violate the Fourth Amendment into a constitutional procedure, such contention would indeed be novel.

This is not a case such as *Heller* where a Judge lawfully entered a theatre, took his place in the audience, viewed the film, determined its obscenity vel non, and issued a warrant for the seizure of one copy of the film as evidence to be used in connection with the simultaneous arrest of its exhibitor. In *Heller* the "search", if it can be referred to as such, was no more unlawful than any viewing by any other member of the audience in the theatre. In *Heller,* the expression was not suppressed until after the constitutionally permissible viewing of the film, nor did the seizure of a single copy of the film constitute, as the Supreme Court noted, a total suppression of its exhibition. In the instant case, on the other hand, the premises were shut down prior to the "search", the "search" was conducted prior to a determination of the obscenity vel non of the expression and the issuance of a warrant, and the seizure which virtually cleaned out the store's entire stock of expressive material including duplicate copies of the expressive material, clearly earmarking the search as a suppressive rather than an evidentiary seizure. It cannot be overemphasized that an illegal search and seizure must be judged by the facts which existed at the time of the initiation of such illegal search and seizure and cannot

be retroactively legalized and constitutionally justified by prospective facts such as a subsequent judicial scrutiny or even a subsequent determination of the obscenity of the material. Thus, when the Judge, District Attorneys, and state troopers invaded the premises, chased the customers, compelled the clerk to activiate the coin operated film machines so that they could be operated without the insertion of coins, and tore the cellophane wrappers off the books so that they could be inspected, these acts initiated the search and seizure at the premises, a search and seizure which was not preceded by the *prior* judicial scrutiny mandated by *Heller* and *Abronovitz*. Certainly, it could not have been warranted by the search warrant thereafter issued by Judge O'Connor.

CONCLUSION

With the exception of the irrevelant collusion of Judge O'Connor in the unsanctioned search of the premises and massive suppressive seizure of material contained therein, the facts of the instant case fall squarely within the constitutional decisions of the United States Supreme Court in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, *Marcus* v. *Search Warrant*, 367 U.S. 717, *Lee Art Theatre* v. *Virginia*, 393 U.S. 636 (as construed by our Court of Appeals in *People* v. *Abronovitz*, 31 U.S. 2d 160), and *Heller* v. *New York*, 413 U.S. 483. As such, the search and seizure was violative of the First, Fourth and Fourteenth Amendment rights of the defendant herein, *Roaden* v. *Kentucky*, 413 U.S. 496, requiring suppression and return of all the material seized from the premises. As was said in *Marcus* v. *Search Warrant*, *supra*, at 724, and reaffirmed in *Roaden* v. *Kentucky*, *supra*, at 506,

> "The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectional publications is not new . . . the Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."

The foregoing conclusion was founded upon the broad and clear announcement in *Roaden* v. *Kentucky*, *supra*, at 504 of a higher hurdle in the evaluation of reasonableness in connection with a search and seizure when expressive matter presumptively protected by the First Amendment is involved.

> "Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment war-

rant requirements because we examined what is 'unreasonable' in the light of the values of freedom of expression."

Respectfully submitted,

KASSNER & DETSKY, P.C.
Attorneys for Defendants.
Alexander Mandakis and
Loji Sales, Inc.

HERBERT S. KASSNER,
Of Counsel

Memorandum of Law

STATE OF NEW YORK
LOCAL CRIMINAL COURT
County of Orange, Town of Wawayanda

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

ALEXANDER MANDAKIS,

Defendant.

STATE OF NEW YORK
LOCAL CRIMINAL COURT
County of Orange, Town of Wawayanda

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

LOJI SALES, INC.,

Defendant.

Since these are two separate cases, the People will treat each case separately.

ALEXANDER MANDAKIS

Defense counsel conceded in his papers that there was no search in the Mandakis case. Accordingly, there is no need for a suppression hearing, the court should not sup-

press the two films and the case should be set down for trial.

LOJI SALES, INC.

In essence, defense counsel's papers only apply to the search as to defendant, Loji Sales, Inc., (see above). Since defense counsel is challenging the manner in which the search was conducted, the People have no objection to the holding of a suppression hearing solely on this issue. *People* v. *Glen,* 30 NY 2d, 252, 262.

It is the People's position that once a hearing has been held, the facts will establish that the Police, accompanied by the Judge, entered the defendant's store when it was open to the public. The Police arrested the store manager with an arrest warrant. The Judge then viewed certain material which was in places open to the public and made an ex parte screening as was done in the case at bar. Because this evidence was in a place open to public acsess, the Judge could screen it as he did in the case at bar. *People* v. *Matherson,* 16 NY 2d 509.

The facts will further indicate that there was no blocking of distribution or putting the defendant out of business. The store was opened for business the very next day. But in any case, defendant's reliance on *Heller* is misplaced. What *Heller* requires is that there is a prompt full hearing before any final restraint. In the case at bar, the terms of the warrant itself authorized a prompt hearing if the defendant desired one.

Defense counsel's analogy to *People* v. *Abronovitz,* 31 NY 2d 160 is totally incorrect. Although there was a large seizure of items, that was not the reason for suppression.

The deficiency in that case was that the Police seized items that had not been examined by a judge preliminatorily to their seizure. The court held that the general clause in the warrant authorizing the seizure of "scenes of nude people, which expose female and male genital organs and pubic areas tnat the male penis and female breat" did not sufficiently limit the police's discretion as to what to seize. In the case at bar, that deficiency was corrected because the Judge first reviewed the material and then told the Police to seize it. Thus, there is no problem of unlimited police discretion as there was in *Abronovitz.*

CONCLUSION

Once the facts are established the Court should not suppress the evidence.

Dated: Goshen, New York
August 12, 1976

Respectfully submitted,

DAVID S. RITTER,
District Attorney of
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Office & P. O. Address
County Government Center
Goshen, New York 10924

By: RICHARD L. PARKER, ESQ.
Of Counsel

Judgments in Question

STATE OF NEW YORK
LOCAL CRIMINAL COURT
County of Orange, Town of Wawayanda

THE PEOPLE OF THE STATE OF NEW YORK

—against—

LOJI SALES, INC.,

Defendant.

The Opinion and Order of the Local Criminal Court: Town of Wawayanda (November 13, 1976) appears in the Petition for Certiorari, p. 1a.

Judgments in Question

135-1978

March Term 1978

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County, on the 25th day of April, 1978.

Present—HON. THOMAS P. FARLEY,
Presiding Justice,
" " DAVID L. GLICKMAN,
" " MARIO PITTONI,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

LO-JI SALES, INC.,

Appellant.

The decision of the Appellate Term of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts (April 25, 1978) appears in the Petition for Certiorari, p. 5a.

Judgments in Question

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. LAWRENCE H. COOKE,
Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

LO-JI SALES, INC.,
Appellant.

The order of the New York Court of Appeals (July 5, 1978) appears in the Petition for Certiorari, p. 7a.

Supreme Court, U. S.
FILED
OCT 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

against

STATE OF NEW YORK,

Respondent.

PETITION IN OPPOSITION TO A WRIT OF CERTIORARI.

DAVID S. RITTER
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Attorney for Respondent
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Goshen, N. Y. 10924
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Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-511.

LO-JI SALES, Inc.,

Petitioner,

against

STATE OF NEW YORK,

Respondent.

PETITION IN OPPOSITION TO A WRIT OF CERTIORARI.

Questions Presented.

1. Whether or not this Court should review a State Court's ruling upholding the seizure of 8 and super 8mm films and pictorial magazines, which were being exhibited to the general public, at the oral direction of a duly elected Justice of the Peace, who was legally inside petitioner's store pursuant to a search warrant and who viewed as much of the films and magazines as he deemed necessary to determine whether or not there was reasonable cause to believe that the film or magazine was obscene, and when the films and magazines seized were recorded on the search warrant and the search warrant guaranteed petitioner the right to a full, prompt adversary hearing, to review the Judge's preliminary determination of obscenity?

2. Whether or not this Court should review a case in which petitioner has failed to pay a fine, which was due after State Appellate Court review was completed; when after his conviction petitioner has voluntarily vacated the store and turned the store over to a new corporate entity?

Constitutional and Statutory Provisions Involved.

In addition to those mentioned by petitioner, the pertinent provisions of Section 235.00, Subdivision 1 of the State of New York Penal Law (*McKinney's Consolidated Laws of New York*, 1967 ed., as amended by New York Law 1974, Chapter 89, Section 1) are set forth in Appendix A hereto.

Statement of the Case.

On June 20, 1976, New York State Police Investigator J. A. Hurbanek bought two films entitled *Linda and Duke* and *Four For Dinner* from Mr. Alex Mandakis, the manager of Lo-Ji Sales, Inc.'s Adult Store (hereinafter the store), in Wawayanda, New York. While at the store Investigator Hurbanek learned from Mr. Mandakis that other films in the store, and the books and magazines in the store contained sexually explicit material similar to the type and character of the material that was in the two above entitled films.

After Investigator Hurbanek personally viewed both films in their entirety, he asked Town of Wawayanda Justice O'Connor to independently view the films so that the Judge could determine for himself whether or not there was reasonable cause to believe that these sexually explicit films were obscene under the Penal Law of the State of New York.

On June 25, 1976, at approximately 9:00 A.M., Town Justice O'Connor viewed both films, in their entirety at the Orange County District Attorney's Office, Goshen, New York. Thereafter Investigator Hurbanek asked Judge O'Connor to accompany him to the store so the Judge could determine whether or not there was reasonable cause to believe that other sexually explicit material was also obscene under the New York State Penal Law. At approximately 10:30 A.M. in the Town of Wawayanda, Investigator Hurbanek signed the affidavit in support of the search warrant, and Judge O'Connor then issued the search warrant which formed the basis for the search in the case at bar.

At the time the Judge signed the search warrant, it read as follows:

> LOCAL CRIMINAL COURT
> TOWN OF WAWAYANDA
> COUNTY OF ORANGE
> STATE OF NEW YORK
>
> HONORABLE JOHN O'CONNOR,
> ISSUING JUDGE.
>
> TO ANY POLICE OFFICER OF THE NEW YORK STATE POLICE:
>
> You are hereby authorized and directed to search the following premises: a single story brown wood frame building named "Adult Store", located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

You are hereby authorized and directed to search for and seize the following property, to wit:

1.) 200 foot reels of 8mm motion picture film entitled LINDA AND DUKE.

2.) 200 foot reels of super 8mm motion picture film entitled FOUR FOR DINNER.

3.) The following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law.

This warrant must be executed not more than 10 days after the issuance and any property seized pursuant hereto shall be returned and delivered to the Court without unnecessary delay.

The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law.

DATED: Goshen, New York
June 24, 1976.

Local Justice

At approximately 11:13 A.M., Judge O'Connor and Investigator Hurbanek entered the store. Investigator Hurbanek told Mr. Mandakis that he had a warrant for his arrest (this warrant was also signed by Judge O'Connor that morning) and that Judge O'Connor was there to conduct a search of the store. Investigator Hurbanek then advised Mr. Mandakis of his rights under the Fifth and Sixth Amendments to the United States Constitution.

Judge O'Connor viewed parts of 23 films being shown to the public in money operated machines in the front room of the store and then viewed parts of the four films being shown to the public in money operated machines in the rear of the store until he was satisfied that there was reasonable cause to believe that the film was obscene under the Penal Law of the State of New York; and upon making that determination, orally directed the police to seize 26 of the films.

After viewing the films in the rear room, the Judge returned to the front room of the store where magazines were being displayed to the public on tables and three walls. The Judge looked through enough of each magazine so that he could determine whether there was reasonable cause to believe that the individual magazine was obscene under the New York State Penal Law; and if the Judge was satisfied that there was reasonable cause to believe that the magazine was obscene, he directed the police to seize each and every copy of the magazine being displayed to the public. It should be noted that the Judge did not order the police to seize every magazine that he viewed; and accordingly, those magazines that the Judge did not deem obscene were left in the store. After viewing the magazines, the Judge went to a counter in the front room of the store which contained films in boxes. On the outside of each box there was a still picture. Mr. Mandakis, the person in charge of the store, told the Judge that it was not necessary to view the film inside the box because all the films were "sex films" and that the picture on the box showed what the film was all about. The Judge then viewed the pictures on the box. If he was satisfied from viewing the pictures that there was reasonable cause to believe that the film inside was obscene under the Penal Law, he directed the police to seize it.

The Judge left the store at approximately 5:00 P. M. and at that time the police transported to New York State Police Headquarters, Middletown, New York, all the items that the Judge directed be seized. Between 5:30 P. M. and 11:00 P. M. the police listed on the search warrant the additional items that the Judge had orally directed they take from the store. Investigator Hurbanek then brought the search warrant to the Judge.

During the entire period that the search was conducted the store was open to the public. Mr. Mandakis moved freely throughout the store during the entire day.

On June 26, 1976, the day after the search, the store was again opened for business.

On July 15, 1976, petitioner was charged with three counts of Obscenity in the Second Degree, in violation of the provisions of Section 235.05, Subdivision 1 of the Penal Law of the State of New York. The subject of the first count was approximately 400 magazines seized at the direction of Judge O'Connor during the course of the search from the tables and walls in the front part of the store. The subject of the second count was approximately 474 reels of film which were seized from the counter in the front of the store at the direction of Judge O'Connor during the course of the search. The subject of the third count was 26 rolls of film seized from the money operated machines in the front and rear of the store at the direction of Judge O'Connor during the course of the search.

By motion dated July 29, 1976, petitioner, through his attorneys, moved to suppress the evidence seized from the store on June 25, 1976. With the consent of the petitioner's attorney and the People, a suppression hearing was scheduled and held on August 27, 1976, at 2:00 P.M. Prior to

the hearing, petitioner asked Judge O'Connor to disqualify himself on the ground that petitioner intended to call the Judge as a witness. Accordingly, the Judge disqualified himself and Town of Wawayanda Justice Frank Giza conducted the hearing. Town Justice Giza submitted written findings of fact and conclusions of law dated November 13, 1976.

On February 3, 1977, petitioner, through his attorneys, pled guilty to all three counts of Obscenity in the Second Degree and was fined $1,000 on each count.

Pending petitioner's appeal to the State Appellate Courts, the State of New York and the Local Justice agreed to stay imposition of the $3,000 fine.

In March of 1977, petitioner abandoned the store and a new corporate owner, Gorunga Inc. took over possession of the store.

Petitioner appealed Judge Giza's decision to the Appellate Term, Ninth & Tenth Judicial Districts, Supreme Court, State of New York, and on April 25, 1978, the Appellate Term upheld the determination of Town Justice Giza.

Thereafter, on July 5, 1978, the New York Court of Appeals denied petitioner's leave to review the Appellate Term's decision.

After the New York Court of Appeals refused to review petitioner's appeal, petitioner refused to pay the fine of $3,000 which had been stayed.

ARGUMENT.

1.

The Court should not review a State Court's ruling upholding the seizure of 8 and super 8mm films and pictorial magazines, which were being exhibited to the general public, at the oral direction of a duly elected Justice of the Peace, who was legally inside petitioner's store pursuant to a search warrant and who viewed as much of the films and magazines as he deemed necessary to determine whether or not there was reasonable cause to believe that the film or magazine was obscene, when the films and magazines seized were recorded on the search warrant and the search warrant guaranteed petitioner the right to a full, prompt adversary hearing, to review the Judge's preliminary determination of obscenity.

There is no reason for the Court to review the decision of the New York State Courts. This case involves application of the holding of *Heller v. New York,* 413 U. S. 483 (1973), to 200 foot reels of 8mm film and pictorial magazines, which contained captions under some of the pictures or a small amount of written material describing verbally acts which the pictures depict.

In *Heller v. New York,* this Court stated on page 493:

> With such safeguards (the safeguards of a judicial screening prior to any seizure and the safeguard of a prompt judicial determination of obscenity in an adversary proceeding following the seizure), we do not perceive that an adversary hearing prior to a seizure by lawful warrant would materially increase First Amendment protection. Cf. *Carroll v. Princess Anne, supra,* at 183-184, 21 L. Ed 2d

> 325. The necessity for a prior judicial determination of probable cause will protect against gross abuses while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation. The procedure used by New York in this case provides such First Amendment safeguards, while also serving the public interests in full and fair prosecution for obscenity offenses.

The fact that the warrant was expanded to include the material ordered seized by the Judge upon his viewing of it at the store, does not change the fact that this case is governed by the principles announced in *Heller v. New York, supra.* The holding of *Heller v. New York, supra,* is that there must be a prior judicial screening before the material is seized.

> "(I)t had undoubtedly become a settled principle that a Judge must decide preliminarily whether or not the particular material on which he is asked to authorize seizure is obscene and that this must not be left open to the judgment of the police." *People v. Abronovitz,* 31 N. Y. 2d 160, 165.

The Courts have never set rigid procedures to be followed in issuing search warrants, *People v. Brown,* 40 N. Y. 2d 183. The Courts have realized that application for search warrants and search warrants themselves must be flexible enough to take into account the exigencies of each individual case. In *People v. Brown, supra,* the New York Court of Appeals held that an oral affidavit which was stenographically recorded satisfied the requirements of the New York Criminal Procedure Law and Common Law.

In the case at bar, the search warrant satisfied the requirements of the New York Criminal Procedure Law and Common Law. Every item seized was recorded in writing in the search warrant. The Judge viewed every piece of material before it was seized. Rather than take the time to record the name of the items to be seized on the search warrant at the store, and then directing the police to seize the item, the name of the item was recorded after the search in a quiet setting with a stenographer present. The purposes of having a search warrant in writing are twofold: One, it eliminates the police officer's discretion; and two, it ensures that there is an accurate record of everything that is taken. The procedure followed in the case at bar satisfied both these purposes.

Clearly, there is no other way for any seizure of obscene films and magazines to occur. Under the law, the police officer cannot make the initial determination of obscenity by himself and then bring the material to the Judge for subsequent initial review, *People v. Abronovitz, supra.* Thus, the only alternative is for the Judge to come to the store himself and to make the initial determination of the obscenity in the store, *Heller v. New York, supra.* While the Judge is in the store, he certainly can observe what is openly displayed to the public and review it at the store. See *People v. Matherson,* 16 N. Y. 2d 509. Otherwise, there would be no efficient and effective way of bringing obscene material before a Court without expending public funds to purchase this illicit material.

The fact that the Judge did not view the material in its entirety before deciding whether or not reasonable cause existed for its seizure does not change the principles to be applied. *Miller v. California,* 413 U. S. 15, and *Roth v. United States,* 354 U. S. 476, articulated the standard to be used by the trier of facts in the "final" adjudication of whether the material is obscene. It must be left

to the sound discretion of the reviewing Judge to determine how thoroughly he feels that he must initially review the individual piece of material in order to determine whether or not reasonable cause for its "temporary seizure" exists. This is especially true when a defendant has been offered a prompt, full adversary hearing after the seizure on the issues of whether or not the material is, in fact, obscene. The movies in the money operated machine were not full length movies, but rather the kind that can be viewed for a small quantity of quarters. Certainly the Judge could fairly determine whether or not reasonable cause to seize the film existed by viewing two to five minutes of these short films. The magazines in question basically contained just pictures or pictures with captions. It would not take more than a few seconds to fairly determine whether or not reasonable cause existed to seize this type of magazine. Mr. Mandakis, the clerk of the store, told the Judge that the pictures on the film boxes showed what the "sex films" contained therein were basically about. With that admission all the Judge had to do was to look at the picture on the box to make a reasonable preliminary determination about their obscenity.

The fact that more than one copy of the magazine or film was temporarily seized also does not change the principles to be applied. It is the petitioner's position that whenever more than one copy of a piece of material is seized, then the seizure is automatically equivalent to a final restraint on the distribution of the material. Respondent submits that this position is totally falacious. Petitioner is confusing the safeguard of a prior judicial screening before any seizure with the safeguard of a full, prompt adversary hearing following the seizure. As long as petitioner is offered a prompt, full adversary hearing to determine whether or not the material is obscene, it does not matter if one, two or ten pieces of the material are temporarily seized pending this hearing.

Likewise, the fact that the quantity of 8mm films and pictorial magazines numbered approximately 900 items does not change the principles to be applied. Citing *People v. Abronovitz, supra; A Quantity of Books v. Kansas,* 378 U. S. 205, and *Marcus v. Search Warrant,* 367 U. S. 717, petitioner argues that the magnitude of the search in the case at bar is a *per se* violation of constitutional rights. But, as the Court said in *Heller v. New York, supra,* 491:

> "Those cases (*A Quantity of Books v. Kansas, supra,* and *Marcus v. Search Warrant, supra*) concerned the seizure of a large quantity of books for the sole purpose of their destruction and this Court held that, in those instances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid "danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books".

This case is different from the cases cited by petitioner because one, there was a judicial screening prior to any temporary seizure and because two, the material was seized solely as evidence and the defendant was afforded the right to a full and prompt adversary hearing on the issue of obscenity.

The case at bar is also different from the cases cited by petitioner because all of the materials viewed by the Judge and subsequently seized by the police at the Judge's direction were in the part of the store that was open to the public.

2.

This Court should not review a case in which petitioner has failed to pay a fine, which was due after his State Appellate Court review was completed; when after his conviction petitioner has voluntarily vacated the store and turned the store over to a new corporate entity.

Since petitioner is a corporation, under New York Law, only the corporate entity can be punished. Section 60.25 of the New York Penal Law, *McKinney's Consolidated Law of New York,* Anno.

Since the petitioner has voluntarily vacated the store and relinquished his possession to a new corporate entity, it is respectfully submitted that petitioner is attempting to place himself beyond the jurisdiction of New York Law. Therefore, this Court in its discretion should decline review of this case. See *Estelle v. Dorrough,* 420 U. S. 534 (1975), Rehearing denied, 421 U. S. 921; *Eisler v. United States,* 338 U. S. 189 (1949).

Conclusion.

For the foregoing reasons, a Writ of Certiorari should not issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX A.

Constitutional and Statutory Provisions.

§60.25 Authorized dispositions; corporation

When a corporation is convicted of an offense, the sentence of the court shall be as follows:

(a) A fine authorized by section 80.10; or

(b) Where authorized by section 65.05, a period of conditional discharge as provided in that section; or

(c) Where authorized by section 65.20, unconditional discharge as provided in that section.

In any case where a corporation has been sentenced to a period of conditional discharge and such sentence is revoked, the court shall sentence the corporation to pay a fine.

§235.00 Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. "Obscene." Any material or performance is "obscene" is (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

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In The

Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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ARGUMENT

The Petition in opposition to the Writ of Certiorari sought herein sets forth the following:

> "The Judge then viewed the pictures on the box. If he was satisfied from viewing the pic-

tures that there was probable cause to believe that the film inside was obscene under the Penal Law, he directed the police to seize it" p. 5 (underlining supplied)

* * * * * * * * *

"The Judge looked through enough of each magazine so that he could determine whether there was reasonable cause to believe that the individual magazine was obscene under the New York State Penal Law." p. 5 (underlining supplied)

* * * * * * * * *

"The fact that the Judge did not view the material in its entirety before deciding whether or not reasonable cause existed for its seizure does not change the principles to be applied." p. 10.

* * * * * * * * *

"The fact that more than one copy of the magazine or film was temporarily seized also does not change the principles to be applied." p. 11.

* * * * * * * * *

"Likewise, the fact that the quantity of 8 mm films and pictorial magazines (seized)numbered approximately 900 items does not change the principles to be applied." pp. 11-12.

If the above facts and legal assertions do not establish a constitutionally impermissible seizure in violation of the First, Fourth and Fourteenth Amendments, fifty years of prior restraint precedents of this Court have been abbrogated.

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ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

BRIEF FOR PETITIONER

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IN THE

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BRIEF FOR PETITIONER

Opinions Below

The order of the New York Court of Appeals, denying petitioner's application for leave to appeal, is unreported but is set forth in the Petition for Certiorari, p. 7a. The order of the Appellate Term of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts, unreported, is set forth in the Petition for Certiorari, p. 5a. The unreported opinion of the Local Criminal Court, Town of Wawayanda, is set forth in the Petition for Certiorari, p. 1a.

Statement of Jurisdiction

The judgment of conviction was entered on February 3, 1977. The order of the Appellate Term affirming the conviction was entered on April 25, 1978. The petitioner's application for leave to appeal was denied by the New York Court of Appeals on July 5, 1978. The petition for a writ of certiorari was filed on September 26, 1978, and was granted on November 27, 1978.

The jurisdiction of this Court rests on 28 U.S.C. Section 1257(3).

Constitutional Provisions and Statutes Involved

The pertinent portions of the First, Fourth and Fourteenth Amendments to the United States Constitution are set forth in the Appendix to this brief, *infra*, p. 48.

Sections 235.00 and 235.05 of the New York Penal Law (McKinney Supp. 1978-1979) are set forth in the Appendix to this brief, *infra*, pp. 48-50. Section 710.70 of the New York Criminal Procedure Law (McKinney 1971) is set forth in the Appendix to this brief, *infra*, p. 50.

The Questions Presented for Review

I.

Were the petitioner's First, Fourth and Fourteenth Amendment rights violated when eleven state officials, including a local town justice, searched every nook and cranny of petitioner's bookstore and seized over 920 films, publications and other items, under circumstances in which, at the time of the search and seizure, they had a search warrant

which authorized only a search for and seizure of two films, the warrant containing an incomplete additional paragraph the language of which failed to embrace any additional items because it merely authorized the seizure of "the following items which the Court independently has determined [to be obscene]," of which there were none at the commencement of the search and seizure?

II.

Assuming that a search warrant which authorized a seizure of two named films and which contained an incomplete paragraph authorizing seizure of "the following items which the Court independently has determined ["to be obscene"] but which, at the time of the search and seizure, failed to designate any items under that incomplete paragraph lent some color of authority to a search for and seizure of a huge quantity of materials at petitioner's store in addition to the mere two films named in the warrant, did the warrant and search and seizure under it, nevertheless, violate the petitioner's First, Fourth and Fourteenth Amendment rights because:

A. The warrant was issued on the strength of a police officer's affidavit which, insofar as it was concerned with materials other than the two films which were named and had been viewed by the issuing judge, consisted entirely of the police officer's conclusory allegation that there were other items in the petitioner's store, besides the two named films, which were obscene; and/or

B. The warrant was an illegal general warrant?

III.

Even if the foregoing questions were resolved adversely to petitioner, did the seizure of a huge quantity of materials from its bookstore, nevertheless, violate petitioner's First,

Fourth and Fourteenth Amendment rights on the ground that the hasty and superficial on-the-spot examination of small fragments of each of hundreds of films and publications at petitioner's store, none in their entirety, by a local town justice failed to constitute a focusing search on the question of the obscenity of such materials and was an insufficient basis upon which to order their seizure?

IV.

Did the seizure by eleven state officials, prior to an adversary hearing on the question of obscenity, of every copy of every film offered for sale or exhibition to the public at petitioner's store, along with every copy of a substantial number of the books and magazines offered for sale at petitioner's store and every single one of the film projectors used by petitioner to exhibit films, violate petitioner's First, Fourth and Fourteenth Amendment rights?

Statement of the Case

A. Procedural History.

This case is before this Court on a writ of certiorari to review petitioner's conviction on three counts of promoting obscene material under New York State Penal Law §235.05. The case arose out of a massive seizure of materials during the course of a six-hour siege of petitioner's bookstore by eleven state officials, including a local town justice, acting under color of a search warrant which was completed only *after* they had searched for and confiscated over 920 books, magazines, films and other materials. In the trial court, the petitioner timely moved to suppress the evidence obtained during the course of this unconfined search and seizure, but the motion was denied. Subsequently, the petitioner entered a plea of guilty to the three charges and was fined

$1,000.00 on each count for a total of $3,000.00. On appeal to the Appellate Term of the State of New York for the Ninth and Tenth Judicial Districts,[1] petitioner's convictions were affirmed. The petitioner's timely application for leave to appeal to the New York Court of Appeals was denied. This Court then granted certiorari on November 27, 1978.

B. Facts.

On June 20, 1976, Investigator Johannes Hurbanek of the New York state police entered petitioner's bookstore in the Town of Wawayanda, where he purchased two motion picture films entitled "Linda and Duke" and "Four for Dinner" offered for sale there (Tr. 4-5, 44).[2] Five days later, on the morning of June 25th, he went to the district attorney's office for Orange County in Goshen, New York, where he found Town of Wawayanda Justice John O'Connor (Tr. 5). Investigator Hurbanek requested the judge to view the two films which Hurbanek had purchased at petitioner's store, and the judge did so that morning at the prosecutor's office (Tr. 6, 42). Investigator Hurbanek then prepared two affidavits, one for a search warrant and one for a warrant for the arrest, on an obscenity charge, of Alex Mandakis, the clerk who had sold Hurbanek the films (Tr. 6-7). The affidavit in support of the search warrant detailed the purchase of the two films at petitioner's bookstore by Hurbanek, included an allegation that the affiant believed sim-

---

[1] Under New York practice, appellate review of the denial of a motion to suppress evidence is available even when the defendant pleads guilty to the charge following the denial of his motion to suppress. N.Y. Crim. Pro. Law §710.70(2) (McKinney 1971).

[2] The abbreviation "Tr." refers to the Transcript of the hearing on the petitioner's motion to suppress evidence.

ilar items were being offered for sale at the petitioner's store, and ended with a curious request that Judge O'Connor join ranks with the police in conducting a raid on petitioner's bookstore. (A. 5a-7a).[3]

Before the affidavits or warrants were signed, Hurbanek and the judge left the prosecutor's office and proceeded to the town of Wawayanda, where they met with a number of police officers at a traffic intersection (Tr. 9). There, Hurbanek signed the affidavits and the judge signed the warrants (Tr. 9). At the time the judge signed the search warrant on the morning of June 25, 1976, it was a two-page document (Tr. 88) and read as follows:

LOCAL CRIMINAL COURT
TOWN OF WAWAYANDA
COUNTY OF ORANGE
STATE OF NEW YORK

HONORABLE JOHN O'CONNOR,
ISSUING JUDGE

TO ANY POLICE OFFICER OF THE NEW YORK STATE POLICE:

You are hereby authorized and directed to search the following premises: a single store brown wood frame building named "Adult Store", located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

You are hereby authorized and directed to search for and seize the following property, to wit:

[3] The abbreviation "A." refers to the appendix filed with this brief.

1.) 200 foot reels of 8mm motion picture film entitled LINDA AND DUKE.

2.) 200 foot reels of super 8mm motion picture film entitled FOUR FOR DINNER.

3.) The following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law:

This warrant must be executed not more than 10 days after the issuance and any property seized pursuant hereto shall be returned and delivered to the Court without unnecessary delay.

The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law.

DATED: Goshen, New York
June 25, 1976

Local Justice

Armed with this warrant and an arrest warrant, Judge O'Connor, seven state policemen and three members of the prosecutor's office[4] converged on the petitioner's bookstore and conducted what can only be described as a general, exploratory and roving search of every nook and cranny of petitioner's bookstore, from which ultimately more than 860 books, magazines, and films and a total of over 920 items

[4] *See* Tr. 69-72.

altogether were seized and carted away in a truck. (*See* A. 27a-45a).

The search and seizure began at 11:13 a.m. when the raiders entered the petitioner's premises and informed the only employee present, Mr. Mandakis, that he was under arrest and that the state officials possessed a warrant under authority of which they were going to search the bookstore for obscene materials (Tr. 11-12). For the next six hours, the bookstore was under siege by eleven state officials who methodically ransacked every section of the bookstore and seized every available copy of each film and publication that the judge determined to be obscene after a hasty and superficial inspection of a minute portion of each of hundreds of films and publications.

After announcing their general intention to the clerk, Mandakis, the raiders told him that they would begin their search in the area of the store where films are exhibited in private booths to patrons who insert quarters into a device which activates the film projector (Tr. 13). After inquiring of clerk Mandakis whether he had sufficient quarters to activate the film projectors in all 23 booths available for viewing of motion picture films, the clerk, instead, turned on a main switch which allowed the film projectors to be activated without inserting quarters (Tr. 13, 121).[5] Judge O'Connor then went into each of the 22 booths which were operable[6] and viewed two to three minutes of each film (Tr. 97). In no instance did he view any film in its entirety (Tr. 98). Nevertheless, on the basis of viewing a small portion of each film, he determined that all of them were obscene and ordered the seizure of all of the films (Tr.

[5] According to Mandakis' affidavit, attached to petitioner's motion to suppress, he was ordered to turn on the main switch (A. 49a).

[6] One of the booths was inoperable (Tr. 16).

15-16). He did not stop with the seizure of the films, however. He further ordered the seizure of all of the film projectors used to exhibit the films in the booths (Tr. 15-17), despite the fact that, as he conceded at the motion hearing, they were capable of projecting nonobscene material (Tr. 104), and despite the obvious fact that without film projectors the petitioner would be unable to exhibit *any* motion picture film, regardless of its content. Judge O'Connor also ordered the seizure of four of the coin boxes attached to the booths (Tr. 64, 68). In one instance, the policeman who seized one of these coin boxes actually broke a booth in order to retrieve the coin box (Tr. 67).[7]

After completing the seizure in the booth area, Judge O'Connor proceeded to two rooms in the rear of petitioner's premises, where the judge viewed two to five minutes of each of four motion picture films being exhibited in those rooms (Tr. 16-17, 98). Again, after having viewed only a small part of each film, the judge determined that they were obscene and, consequently, ordered the seizure of all of them as well as all of the film projectors used for their exhibition (Tr. 16-17).

While Judge O'Connor collected and seized every one of petitioner's films and projectors in the booth area and the two rear rooms, several of the police officers who occupied petitioner's premises remained in the main room of the store where they busily grabbed books and magazines from display cases and stacked them in piles, in anticipation of an order by the judge to seize all available copies of a large number of publications (Tr. 18-19). Each stack of books represented a different title; if there were five copies of a

[7] Mandakis' affidavit detailed further physical damage done by the police (A. 49a).

particular publication in the petitioner's store, all five would be pulled from the shelf and stacked in one pile (Tr. 18-19).

When Judge O'Connor completed the seizure of films and projectors in the rear of the store, he returned to the main room where books and magazines were offered for sale in four major display areas (Tr. 20). Roving from one section to another, the judge employed the same procedure in each display area until each one of the four sections in the main room had been gutted. He first ordered the police to rip off the sealed plastic which completely enclosed each of the magazines and many of the books in the store (Tr. 19). Then, the judge spent "maybe two maybe ten seconds" on each book or magazine, leafing through "two or three pages, half a dozen pages" of each publication (Tr. 98). In no case did the judge read any book or magazine in its entirety (Tr. 99). Nevertheless, on the basis of a superficial inspection of a minute portion of each publication, the judge was able to make a determination of obscenity, applying a test which he could not even recall at the motion hearing (Tr. 101-102).[8] He then ordered the police to seize not just each

[8] At the hearing, Judge O'Connor first attempted to recite what he understood to be the New York definition of obscenity: ". . . when community standards on a prurient interest of sex, or in deviated ways of sexual patterns. . . ." (Tr. 99) His definition of "prurient" was as follows: "My definition of prurient is what I would call deviated. . . ." (Tr. 100). He defined "deviated" as "expounded to a point where it's vulgar, ridiculous." (Tr. 100). Finally, when he was asked to recite the three-pronged test of obscenity in force in New York, he conceded that he could not recall it without reference to the New York Penal Code (Tr. 101-102). He did state, however, that he had the statute book with him during the raid and that he consulted it (Tr. 101).

Under New York law, town justices are not required to be lawyers. N.Y. Uniform Justice Court Act, Art. 1, §105 (McKinney Supp. 1978-1979). In this case, neither the town justice who issued the search warrant and participated in the raid nor the town justice who presided over petitioner's trial was a lawyer. *See* letter attached as Exhibit A to this brief, *infra*, at 51.

publication he found to be obscene, but also every single copy of each such publication the police could find on the premises (Tr. 20-25) as well as every single copy of each "similar" publication (Tr. 35). Indeed, according to the testimony at the motion hearing, whenever the judge found an item in the store to be obscene, he ordered the seizure of all identical or "similar" items (Tr. 8, 35, 125).

The raiders then moved to the one remaining area of the store which they had not yet searched, the counter area where the cash register was located, and where films and other articles were located behind a glass case (Tr. 26-27). They told clerk Mandakis that they did not intend to view the films in the case, but merely intended to open the boxes in which each of the films was contained (Tr. 26). When Mr. Mandakis informed them that the still photographs on each of the boxes depicted a scene that was part of the film contained in the box, the raiders determined that it was unnecessary even to open the boxes prior to seizing the films (Tr. 26). Instead, solely on the basis of viewing the 3 to 4 inch square still photograph on each of the boxes, the judge determined that in each and every case the 8mm, 200-foot film inside the box was obscene (Tr. 36-38, 123-124). Consequently, he ordered the police to confiscate every single copy of each film located in the glass case (Tr. 26, 36-37).

Finally, the judge ordered the police to seize numerous other articles on the petitioner's premises. For example, the judge ordered the seizure of certain articles of clothing displayed on mannequins in the store, including brassieres and panties, because he found such articles to be obscene (Tr. 103). He found the clothing to be obscene because it was displayed in such a way as to "arouse sexuality" and because the clothing was not, in his opinion, the type com-

monly "used" (Tr. 103). As he stated with respect to the brassieres and panties, "It was of a much frilly, more frilly nature. I don't think I would find my wife buying one, we'll put it that way" (Tr. 104). The judge, therefore, ordered the clothing seized, as well as the ten mannequins on which the clothing was displayed (Tr. 103, 54-55; A. 39a). Other items seized included a ring toss game and a box containing business records (A. 45a).

By the day's end, state officials whose number fluctuated between eleven and fourteen[9] had occupied petitioner's bookstore for six hours and had seized over 860 books, magazines and films and over 920 items altogether under color of a warrant which, at the time of its issuance and execution, specifically identified but two films for seizure, both of which the state officials already had in their possession prior to the search (Tr. 35). The state officials had virtually seized and closed the entire bookstore for a six-hour period. Although Investigator Hurbanek insisted, in his testimony at the motion hearing, that during the raid petitioner's store was open for business (Tr. 28), the fact of the matter is that at all times there were two or three marked police cars outside the store and three of the state officials who raided petitioner's store were uniformed policemen (Tr. 31). Furthermore, not a single sale was made to a customer during the entire six-hour period, and no customer who had the courage to venture into the bookstore remained after becoming aware of the presence of police officers (Tr. 31). In fact, during the six-hour period in which they occupied the petitioner's bookstore, the police actually harassed any potential customers who did happen into the store by compelling them to display to the police some identification (Tr. 32).

[9] Tr. 69-70.

After the state officials finally left petitioner's premises with its entire stock of films and projectors, most of its inventory of books and magazines and its clerk, who was under arrest, the police returned to their barracks and the judge went elsewhere (Tr. 71). Shortly thereafter, two typists from the district attorney's office appeared at the police barracks (Tr. 46). There, out of the presence of the judge who had signed the search warrant many hours earlier, additions were made to the warrant so as to include within its authorization all of the items which had been seized earlier at petitioner's bookstore (Tr. 12). As the police announced the title or other description of each item that had been seized, one typist inserted it in the inventory and the other typist added it to paragraph three of the search warrant (Tr. 46). Thus, the search warrant was transformed, after the search and seizure, from the two-page document it had been at the time the judge signed it to a document consisting of sixteen pages (Tr. 34-35; 48-49).

Later that evening, at approximately 11:00 p.m., Judge O'Connor saw for the first time the completed warrant he had signed more than twelve hours earlier (Tr. 85). He assumed that the additions to the warrant had been based on a list he had seen Investigator Hurbanek make in longhand during the course of the search and seizure (Tr. 96). But since Hurbanek had not included in his list the number of copies of each film or publication seized, the judge conceded that he was not even able to verify that the warrant as modified accurately and completely reflected the materials whose seizure he ordered (Tr. 97).

The materials seized from petitioner's store formed the basis of a criminal complaint charging petitioner with three counts of Obscenity in the Second Degree under N.Y. Penal Law §235.05. It is the petitioner's conviction on these three

counts, following the denial of petitioner's motion to suppress, which is before this Court for review.

Summary of Argument

I.

At the time of its issuance and execution, the search warrant in this case authorized the seizure of two named films as well as "the following items that the Court independently has determined [to be obscene]." But the judge had not determined, prior to the commencement of the search, that any materials, other than the two specifically named films, were obscene. Consequently, at the time the search commenced, there existed no film, publication or other item even arguably embraced within the language of the last paragraph of the warrant. The warrant on its face, therefore, authorized nothing more than a search for and seizure of two films. Petitioner submits, therefore, that the general search for and seizure of a huge number of additional items was nothing more than an illegal warrantless search and seizure because, at the time it occurred, there existed no warrant authorizing it.

II.

Even if the warrant could be interpreted as lending some color of authority to a search for and seizure of materials other than the mere two films identified in it, the warrant and search and seizure under it was, nevertheless, unlawful.

A.

First, it issued on the strength of a police officer's affidavit which, insofar as it was concerned with materials other than the two films identified in the warrant and which

the issuing judge had viewed, consisted solely of the police officer's conclusory allegation that other items in the petitioner's store were obscene. This Court has repeatedly held that a police officer's conclusory assertion of obscenity is an insufficient basis upon which to issue a search warrant for materials presumptively protected by the First Amendment. *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968); *Roaden* v. *Kentucky,* 413 U.S. 496 (1973); *Heller* v. *New York,* 413 U.S. 483 (1973). Under this Court's decisions, the affidavit failed to establish probable cause.

In order to sidestep this Court's prior decisions in the present case, it would be necessary, therefore, to make an argument that would distinguish between the probable cause necessary to justify a *search* for allegedly obscene materials and that which is necessary to justify a *seizure* of such materials, by urging that judicial scrutiny need only precede a seizure of, but not a search for, obscene materials and by claiming that Judge O'Connor did scrutinize the materials in this case prior to seizure. This Court has never drawn a distinction between the probable cause needed to search and that which is required to seize, however, in any context, let alone in the setting of a search and seizure involving films and books, which ". . . calls for a higher hurdle in the evaluation of reasonableness" under the Fourth Amendent. *Roaden, supra,* at 413 U.S. 504. Moreover, the Court has recognized that the power of search as well as the seizure power could be an "instrument for stifling liberty of expression," *Marcus, supra,* at 367 U.S. 729, as amply demonstrated by this case, where eleven state officials literally padlocked petitioner's entire store for six hours during their unconfined search. Accordingly, any claim that the search power may be exercised on a lesser

showing of probable cause than is required for the exercise of the seizure power is untenable. In any event, such a contention would not save the warrant here, for Judge O'Connor never did scrutinize the materials he ordered seized, but merely glanced at isolated fragments of each of the films and publications.

Nor does this case bear any resemblance to *Heller, supra,* where a search warrant issued only *after* the judge there had viewed the film in question in its entirety. Here, the search warrant issued *before* any judicial scrutiny, solely on the strength of a police officer's bald assertions.

B.

Second, the warrant, by its inclusion of the open-ended and unrestrictive language of its last paragraph, directly conflicted with the Fourth Amendment's unambiguous requirement that a warrant particularly describe the items whose seizure is authorized. This Court has recognized that the particularity requirement of the Fourth Amendment "is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for . .eir seizure is the ideas which they contain." *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965). The warrant here was nothing more than a general warrant, the constitutional deficiency of which was not, and could not be, cured either by the presence of the issuing judge during the course of its execution or by the additions made to the warrant after the search and seizure had been completed.

III.

Even if the foregoing deficiencies could be ignored, however, the search and seizure would still have been constitutionally defective, because the judge's on-the-spot determinations as to what materials should be seized was neither designed to focus searchingly on the obscenity *vel non* of the materials before him nor adequate to protect non-obscene material. His superficial examination of small fragments of each of the hundreds of items he ordered seized defied this Court's clear pronouncements that in judging the obscenity of a work, it must be considered as a whole, and was simply an insufficient basis upon which to order the seizure of such materials.

IV.

Moreover, the eleven state officials did not limit their seizure to the single evidentiary copy of each film and publication needed for prosecution. Rather, they seized every single copy of each film or publication thought to be obscene, thereby putting an abrupt and complete halt to the distribution and circulation of numerous films and publications prior to an adversary hearing on the question of obscenity, in violation of the First Amendment, a course of conduct which rendered the seizure unreasonable and, therefore, violative of the Fourth Amendment as well.

ARGUMENT

I.

THE SEARCH FOR AND SEIZURE OF ITEMS OTHER THAN THE TWO FILMS IDENTIFIED IN THE WARRANT AT THE TIME OF ITS ISSUANCE WAS NOTHING MORE THAN AN ILLEGAL WARRANTLESS SEARCH AND SEIZURE.

At the time Judge O'Connor issued a search warrant in this case, the warrant, in its first two paragraphs, authorized the search for and seizure of two named films at petitioner's store and, in its third paragraph, authorized the search for and seizure of "(t)he following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law". It is uncontroverted that when the warrant was issued no materials other than the two films identified in the warrant had been the subject of a determination of obscenity by the judge. Consequently, at the time the warrant was issued and the search commenced, there existed no film, magazine or other item even arguably embraced within the language of paragraph three of the warrant. Accordingly, there existed no warrant authority for the state officials to search for or seize anything other than two films. Nonetheless, on the basis of an arrest warrant and the search warrant which authorized a search for and seizure of but two motion picture films, eleven state officials invaded petitioner's business establishment, immediately placed the only employee on the premises under arrest, and announced their intention to search the petitioner's entire premises indiscriminately for evidence of criminal activity, an intention which the state officials executed for the next six hours (Tr. 11-12, 69-70). In view of the fact that these state officials possessed authority to search for and seize merely two films, petitioner

submits that the general search for and seizure of a huge quantity of other materials amounted to nothing more than an illegal warrantless search and seizure, because, at the time the search for and seizure of those other materials took place, there simply existed no warrant which authorized it.

In a long line of unbroken decisions, this Court has consistently held that a search and seizure not authorized by a prior obtained search warrant is inherently unreasonable under the Fourth Amendment, except in a small number of narrowly defined circumstances. *See United States* v. *Chadwick*, 433 U.S. 1 (1977); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971); *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967); *Stoner* v. *California*, 376 U.S. 483 (1964). Furthermore, this Court has consistently recognized that this fundamental principle protects the security of business premises as well as homes. *See Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977); *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Go-Bart Co.* v. *United States*, 282 U.S. 344 (1931); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920).

Here, in addition to and beyond the search for and seizure of the mere two films whose seizure was authorized by a warrant, an army of state officials went on to conduct an unconfined and general search of the petitioner's entire business premises; they explored every room (Tr. 15-17, 20-27); they sifted through hundreds of films and other items enclosed in a glass case behind the cash register (Tr. 26-27, 36-38); they ransacked business documents contained in a box on the premises (A. 45a); they tore off cellophane wrappers which sealed and completely enclosed hundreds of magazines and books and took possession of these publica-

tions by physically removing them from shelves and stacking them in piles, thereby effecting an immediate search and seizure of them (Tr. 18-19); they harassed potential customers by compelling them to identify themselves (Tr. 32); and they physically carted away over 920 books, magazines, films and other items (A. 27a-45a). All of this conduct of state officials, which was in addition to and beyond their search for and seizure of the two films for which they had a warrant, occurred notwithstanding the nonexistence of a prior obtained warrant to authorize it. In short, it was a warrantless search and seizure of massive scope.[10]

The search for and seizure of materials other than the two films for which there was a warrant in this case was clearly an unlawful warrantless search and seizure. Accordingly, the petitioner's motion to suppress should have been granted by the trial court and the petitioner's conviction, based on constitutional error, should be reversed by this Court. *Mapp* v. *Ohio,* 367 U.S. 643 (1961); *See also Andresen* v. *Maryland,* 427 U.S. 463 at 482, n. 11 (1976).

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[10] Certainly the judge's participation in the search and seizure did not cure the constitutional deficiency, for the Fourth Amendment no more permits the judiciary to conduct warrantless searches and seizures than it allows the executive branch to do so. A warrantless search and seizure by a judge represents no less an arbitrary governmental intrusion than does a warrantless seizure by a police officer. Indeed, the intrusion is even more arbitrary and threatening to a citizen when a judge, to whom the citizen would otherwise turn for enforcement of his constitutional right to be free from warrantless searches and seizures, himself participates in the constitutional violation. In short, judges are not exempt from the Fourth Amendment's prohibition against warrantless searches and seizures even in an ordinary criminal investigation, let alone one involving a search for and seizure of books and films, where this Court has fashioned even more stringent warrant requirements. *See Roaden* v. *Kentucky,* 413 U.S. 496 (1973); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968); *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961). Allowing judges to search and seize without warrants would effectively work a repeal of the Fourth Amendment.

II.

EVEN IF THE WARRANT COULD BE INTERPRETED AS LENDING SOME COLOR OF AUTHORITY TO A SEARCH FOR AND SEIZURE OF MATERIALS OTHER THAN THE TWO FILMS SPECIFICALLY IDENTIFIED IN IT, THE WARRANT, NEVERTHELESS, VIOLATED PETITIONER'S FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

A. No Probable Cause Existed For The Issuance Of A Warrant Authorizing A Search For And Seizure Of Any Materials Other Than The Two Films Specifically Identified In It.

The affidavit submitted by Investigator Hurbanek in support of the search warrant at issue in this case contained a brief description of the two films he had purchased at petitioner's store and which Judge O'Connor viewed prior to the issuance of the warrant (A. 6a). The only other information included in the affidavit was Hurbanek's conclusory assertion that other films, magazines and books in the store were obscene, based upon his belief that they were similar to the two films he had purchased (A. 6a-7a). The affidavit failed to identify a solitary one of these other items either by title or by location in the store, however, nor did the affidavit include a description of the contents of even one of these other films or publications. Therefore, even if the search warrant were to be read as authorizing a search for and seizure of materials in addition to the two identified films, in derogation of its plain language, it would, nevertheless, be constitutionally invalid because it was issued on the basis of a police officer's conclusory allegation rather than upon a focusing search by a neutral and detached magistrate on the question of the obscenity of the materials whose seizure was sought.

This much has been clearly settled by this Court's decisions; The First and Fourth Amendments bar the issuance of search warrants for the seizure of books, magazines and films based solely upon the conclusory allegations of a police officer. *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968); *Roaden* v. *Kentucky,* 413 U.S. 496 (1973); *Heller* v. *New York,* 413 U.S. 483 (1973). Because free expression may be the loser, more stringent procedures leading up to the issuance of warrants for the seizure of allegedly obscene material must be followed than are required for the seizure of other forms of contraband. *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964); *Marcus, supra; Roaden, supra.* Only a procedure which enables a neutral magistrate to focus searchingly on the question of obscenity assures the "necessary sensitivity to freedom of expression," *Freedman* v. *Maryland,* 380 U.S. 51, 58 (1965), which is a constitutional prerequisite to the issuance of a search warrant for allegedly obscene matter. *Marcus, supra; Lee Art Theatre, supra; Roaden, supra.*

In the present case, however, no facts were set forth in the affidavit on the basis of which the judge could give careful consideration to the question of obscenity prior to issuing the warrant. Insofar as it was concerned with materials in the petitioner's store other than the two films specifically identified, the affidavit was virtually indistinguishable from the ones found constitutionally insufficient by this Court in *Marcus* and *Lee Art Theatre.*[11] Under this Court's clear holdings, the affidavit in this case, consisting solely of a police officer's conclusory allegations,

[11] Indeed, in *Lee Art Theatre,* unlike the present case, the affidavit at least identified the titles of the materials thought by the policeman to be obscene.

was insufficient to justify the issuance of a warrant for the seizure of materials in addition to the two identified films which the judge had viewed.

Accordingly, if the warrant authorizing the search for and seizure of other materials in this case is to be defended, that defense must rest upon an argument that would draw a distinction between the probable cause necessary to justify a *seizure* of expressive material for its allegedly obscene content and the probable cause necessary to justify a *search* for such material. In essence, the argument would be that judicial scrutiny of allegedly obscene materials need not precede a governmental search for them, but must only precede a seizure of such materials; and that the focusing search by a magistrate on the question of obscenity which is a precondition of a lawful seizure of allegedly obscene materials may properly occur during the course of a governmental intrusion in the form of a search which has been authorized solely on the strength of a police officer's bald assertions. However, this argument, necessary to sidestep this Court's prior decisions, is without merit for a number of reasons.[12]

First, even assuming that the rule of constitutional law upon which such an argument would have to be constructed

[12] The only other conceivable argument that could be devised to defend the warrant would be that probable cause is not a prerequisite to the issuance of a warrant in the execution of which a judge is to participate. Such an argument is untenable. The probable cause requirement guarantees that citizens will not have their homes or businesses invaded *at all,* unless the government has good reason to do so. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971); *See* Amsterdam, *Perspectives On The Fourth Amendment,* 58 Minn. L. Rev. 349, 411 (1974). Thus, the identity of the government intruder has no bearing on the probable cause requirement. The Fourth Amendment states that *no* warrants shall issue but upon probable cause. It recognizes no exception for warrants which are to be executed by a judge.

were sound, which it is not, the record in the present case would fail to support its application here. Initially, it would apply only if there had been no seizure of films or publications in the present case until after Judge O'Connor had inspected them while on the petitioner's premises. The record is to the contrary, however, for the petitioner's entire store was literally seized and closed as soon as the eleven state officials invaded it, placed the clerk under arrest, stationed uniformed guards both inside and outside the premises, and chased away any potential customers by compelling them to display identification and by the very presence of a battalion of policemen (Tr. 31-32). Thus, in essence, the store's entire inventory of publications and films was seized and under the state's exclusive control before Judge O'Connor had seen a single film or publication. Furthermore, policemen seized hundreds of particular books and magazines before the judge glanced at a single one of them, by pulling them from display cases, tearing off the sealed plastic wrappers which completely enclosed them, and stacking them in piles on the floor (Tr. 18-19). Additionally, Judge O'Connor never did focus searchingly on the question of the obscenity of any of the hundreds of materials ultimately carted away from petitioner's premises. His hasty and superficial inspection of minute portions of the seized publications and films hardly satisfied the constitutional requirement of a focusing search on the question of obscenity which is a constitutional prerequisite to a valid seizure.[13] Thus, since the seizure preceded the judge's "inspection" of the materials, and since, in any event, that inspection was constitutionally insufficient, the rule of constitutional law which would have to be urged in order to avoid application of this Court's

[13] This deficiency is discussed more fully below at pp. 36-41.

prior decisions concerning the probable cause necessary to permit the issuance of a search warrant for allegedly obscene materials would not even apply here.

Second, the rule of constitutional law which would have to be urged in an attempt to justify the warrant here has no support in either the language of the Fourth Amendment or in this Court's decisions. The basic premise of the argument is that a search for an item may constitutionally be authorized upon a lesser showing of probable cause than would justify a seizure of the same item. But the language of the Fourth Amendment, unambiguous on this point, applies with equal force to both searches and seizures. Neither may be effected without probable cause. *See Carroll* v. *United States,* 267 U.S. 132, 149 (1925); *Brinegar* v. *United States,* 338 U.S. 160, 174 (1949); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971). Nor has this Court drawn any distinction in its decisions between the probable cause necessary to warrant a search in a given situation and that which is necessary to warrant a seizure, but rather, the Court has always viewed the probable cause requirement to be the same for either. *See Zurcher* v. *Stanford Daily,* 436 U.S. 547, 553-560 (1978).[14]

Such a rule would also be at odds with the principle established by this Court in *Marcus, supra,* and *Lee Art Theatre, supra,* that a search warrant for the seizure of films or publications may not issue upon the conclusory asser-

[14] Permitting a search for allegedly obscene materials on a lesser showing of probable cause than is necessary to authorize seizure of those materials, for the specific purpose of gaining the additional evidence necessary to authorize the seizure, would also be tantamount to justifying a search and seizure on the basis of "what it turns up". *Bumper* v. *North Carolina,* 391 U.S. 543, 548 n. 10 (1968). This Court long ago rejected such a notion. *Byars* v. *United States,* 273 U.S. 28, 29 (1927); *United States* v. *Di Re,* 332 U.S. 581 (1948); *Henry* v. *United States,* 361 U.S. 98, 103 (1959).

tions of a police officer. While the specific facts in *Marcus* and *Lee Art Theatre* involved searches *and* seizures of allegedly obscene materials prior to any judicial scrutiny of the materials, there is no indication in the Court's opinions in those cases that the searches for the materials were any more proper than the seizures. Indeed, in those decisions, the Court recognized that it was the abuse of the power of search as well as the seizure power by governments to suppress unpopular sentiments which, in large measure, led to the adoption of the Fourth Amendment:

> "The use by the government of the power of *search* and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the *search* and seizure power.
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> "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of *search* and seizure could also be an instrument for stifling liberty of expression." *Marcus, supra,* at 367 U.S. 724, 729 (Emphasis added).

The instant case is concrete proof that the power of search can be used as an instrument for stifling liberty of expression. The six-hour siege by eleven state officials here put an abrupt and lengthy halt to the exhibition of numerous films and to the circulation of hundreds of publications and films, all presumptively protected by the First Amendment. During the search, potential customers were harassed and deprived of their First Amendment right to have access to reading and viewing materials. Had the state officials left petitioner's premises without taking a

single film or publication with them at the conclusion of the six-hour search, they would still have succeeded in choking free expression solely by the exercise of the search power, under authority of a warrant which issued on the conclusory allegations of a police officer.

Because the power to search, no less than the power to seize, is an effective tool by which unpopular, but constitutionally protected, ideas can be suppressed, any notion that the search power may be exercised on a lesser showing of probable cause than is necessary for the lawful exercise of the seizure power must be rejected as unsupportable by the history which led to the adoption of the Fourth Amendment, by the language of the Amendment itself and by the decisions of this Court interpreting it, particularly those decisions which establish the principle that even more stringent probable cause requirements must be met when the object of a search is a book or film.[15]

Nor, contrary to New York's assertion in its brief submitted in opposition to the petition for certiorari, does the present case bear any similarity to what occurred in *Heller* v. *New York,* 413 U.S. 483 (1973). In *Heller,* at the request of an assistant district attorney, a judge went to a com-

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[15] Moreover, if this Court were to accept the novel proposition that a search for allegedly obscene materials is justified by a lesser showing of probable cause than would permit a seizure of such materials, the question would still remain as to what facts must be developed to satisfy this newly contrived concept of probable cause. Petitioner submits that the affidavit in the present case would not have been sufficient to establish probable cause as to the materials other than the two films which the judge viewed, even applying the more relaxed standard of probable cause necessary to permit searches and seizures in cases not implicating First Amendment values. Thus, unless this Court is prepared to permit searches for books and films on a showing which would not even justify searches for firearms, drugs and other forms of contraband, the warrant at issue here cannot be saved by drawing a distinction between searches and seizures.

mercial motion picture theater in New York and purchased a ticket for admission. He took a seat among the other patrons, who numbered approximately 100, and viewed, in its entirety, the film being exhibited at the theater. After the film had ended, and based upon his finding that there was probable cause to believe the film to be obscene, the judge signed a search warrant authorizing a search for and seizure of the film. Police officers then executed the warrant by seizing a single copy of the film. In this Court, the petitioner's sole argument was that the seizure of the film under those circumstances was unconstitutional because it occurred prior to an adversary hearing on the question of obscenity. This Court rejected that argument, in view of the fact that a neutral and detached magistrate had viewed the film in its entirety and had focused searchingly on the question of its obscenity prior to issuing a search warrant, and in view of the further fact that the seizure had been limited to a single evidentiary copy.

This Court did not, in *Heller,* retreat from, but rather reaffirmed, its position that a search warrant authorizing a search for and seizure of allegedly obscene material may not issue on the strength of a police officer's conclusory allegation, but may issue only under a procedure which is designed to enable a magistrate to focus searchingly on the question of the obscenity of the material whose seizure is sought. In *Heller,* unlike the present case, a search warrant was issued only *after* such a procedure had been followed.

By way of contrast, in the present case, the search warrant issued *before* Judge O'Connor viewed any of the hundreds of films and publications which were not identified in the warrant at the time of its issuance, but which he, nevertheless, ordered to be seized under its authority. Here, unlike *Heller,* the search warrant issued upon a police officer's conclusory allegations. When the eleven state officials invaded petitioner's premises under a claim of governmental authority in the form of a search warrant, no magistrate had focused searchingly on the question of the obscenity of any of the huge number of materials not mentioned in the warrant but ultimately seized under it.[16] Here, a squadron of state officials assumed complete dominion and control over the petitioner's entire business premises, harassing potential customers, ransacking films enclosed in a glass case behind the cash register and ripping off the sealed plastic which enclosed the magazines and books on the petitioner's premises, all under color of a search warrant which, insofar as it was concerned with materials other than the mere two films identified in it, had issued on the conclusory assertion of a police officer. Any claim that the procedure followed in this case finds any support in *Heller* is, therefore, completely without merit.

In the present case, no probable cause existed for the issuance of a warrant authorizing a search for or seizure of any materials other than the two films identified in it and which the judge had viewed.[17] Accordingly, the petitioner's

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[16] No contention was ever made in *Heller* that any search of the petitioner's premises there had occurred prior to the issuance of the warrant, which did not happen until after the judge had viewed the film in its entirety. No claim was made in this Court that the judge was engaged in a search when, upon paying the admission price, he viewed the film. During the time that the judge was on the petitioner's premises in *Heller,* his claim of right to be there was no greater than that of any other paying customer and he certainly was not there under any claim of governmental authority. In the present case, of course, eleven state officials entered petitioner's store and occupied it for six hours under a claim of governmental authority.

[17] Indeed, there was not even a valid reason for the issuance of a search warrant for the seizure of the two films the judge had viewed, because the state already had evidentiary copies of those

motion to suppress the evidence obtained under color of that improperly issued warrant should have been granted. *Mapp* v. *Ohio, supra.* Petitioner, therefore, urges this Court to reverse its conviction.

B. The Warrant Was An Illegal General Warrant.

The search warrant in this case, both at the time of issuance and at the time of execution, contained an incomplete third paragraph authorizing the search for and seizure of "[t]he following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law" (Tr. 86). No items were listed under this language in the warrant, however, until *after* the completion of the search and seizure. Yet it was ostensibly under authority of this language that eleven state officials converged upon the petitioner's establishment and seized from it a huge quantity of films, magazines, books, projectors, coin devices, clothing, mannequins and assorted other items. Under these circumstances, petitioner submits that, aside from the lack of probable cause for the issuance of a warrant to seize materials other than the two films which the judge had viewed, the inclusion in the warrant of the open-ended and unrestrictive language of its third paragraph rendered the warrant invalid on its face, because it failed to describe with particularity the items whose seizure it authorized, in direct contravention of the Fourth Amendment. The warrant was nothing more than a general warrant of the most pernicious kind and precisely the type of warrant the use of which it was the mission of the Fourth Amendment to bar forever.

films. The only purpose served by the seizure of additional copies of those films was an illegal purpose—to block exhibition and circulation of those films prior to an adversary hearing, in violation of the First Amendment. *See Heller, supra,* at 413 U.S. 492. Thus, the entire warrant violated the First Amendment and, because a warrant which authorizes a seizure which is in direct conflict with the First Amendment is obviously not reasonable, the Fourth Amendment as well.

The history of the unchecked abuses attendant to the use of general warrants, known as writs of assistance, both in England and in the colonies prior to the revolution has been fully chronicled in numerous decisions of this Court. *See Boyd* v. *United States,* 116 U.S. 616 (1886); *Frank* v. *Maryland,* 359 U.S. 360 (1959); *Marcus, supra; Stanford* v. *Texas,* 379 U.S. 476 (1965); *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307 (1978). Suffice it to say, the hated general warrant was a leading cause of the American revolution and was the precise evil against which the Fourth Amendment was directed. *See Stanford* v. *Texas, supra,* at 379 U.S. 481-482. Moreover,

> "[w]hat is significant to note is that this history is largely a history of conflict between the Crown and the press. It was in enforcing the laws licensing the publication of literature and, later, in prosecutions for seditious libel that general warrants were systematically used in the sixteenth, seventeenth and eighteenth centuries." *Id.,* at 379 U.S. 482. *See also Zurcher* v. *Stanford Daily, supra,* at 436 U.S. 564.

For this reason,

> ". . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." *Stanford* v. *Texas, supra,* at 379 U.S. 485. *See also Marcus* v. *Search Warrants, supra; A Quantity of Books* v. *Kansas, supra.*

In the case at bar, however, the warrant was completely lacking in the particularity required by the Fourth Amendment. It constituted a "roving commission" for eleven state officials to "search where they pleased" for whatever they chose to confiscate. *Stanford* v. *Texas, supra,* at 379 U.S. 482. Under its broad authority they seized hundreds of books, magazines and films; they seized film projectors, coin boxes, business records, clothing, mannequins, rubber goods, aerosol cannisters of tear gas and even a ring toss game (A. 27a-45a).

Nor was the constitutional deficiency of the warrant overcome by the presence of the issuing judge during the course of the execution of the warrant at petitioner's premises. It is true that one of the purposes served by the particularity requirement of the Fourth Amendment is to remove from the officers executing the warrant any discretion as to what is to be taken under it. *See Marron* v. *United States,* 275 U.S. 192, 196 (1927); *Andersen* v. *Maryland,* 427 U.S. 463, 480 (1976); *Marcus, supra,* at 367 U.S. 732. It might be argued, therefore, that the issuing judge can check the discretion of the officers executing the warrant as effectively by being present at the search and requiring the executing officers to obtain his approval as to each item they propose to seize, prior to seizure, as he can by specifying with particularity in the warrant those items whose seizure is authorized. But such an argument presupposes that the issuing judge acts at all times in a neutral, detached and judicial fashion, independent of the enforcement branch of government. In the instant case, however, the issuing judge was not present at petitioner's premises merely to rule on requests of the executing officers for authority to seize particular items. Rather, the judge himself assumed the role of an executing officer as he participated fully, with seven policemen and three members of the prosecutor's office, in the search and seizure itself. Indeed, the judge's participation in the actual search and seizure was greater than that of any of the other state officials who occupied petitioner's premises. In the truest sense, the judge had joined ranks with the law enforcement branch of government to engage " . . . in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948).

Moreover, besides removing discretion from the officers executing the warrant as to what items to seize, the particularity requirement of the Fourth Amendment serves other important functions, none of which can be served as effectively by the presence of the issuing judge during the search. Most importantly, the particularity requirement is designed to make general searches impossible. As this Court stated in *Andresen* v. *Maryland,* 427 U.S. 463, 480 (1976):

> "General warrants, of course, are prohibited by the Fourth Amendment. '[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized.'" (Cite omitted).

The warrant in the present case authorized, even contemplated, a general search, and that is precisely what occurred. Only specificity in the warrant, and not the presence of the judge at the search, could have provided an adequate guarantee that the scope of the search would be limited to reasonable proportions. The particularity requirement of the Fourth Amendment is designed to insure

that the lawful limits of the contemplated search are fixed at the outset. The warrant in this case, however, placed no boundaries beyond which the search could not proceed nor did it place any limitation on what could be seized. Rather, the language of the warrant was so open-ended and flexible that nothing at petitioner's store was beyond the scope of the warrant.[18]

Furthermore, under the Fourth Amendment, the warrant scheme serves an important informational and notice purpose and the particularity requirement plays a substantial role in furthering that purpose. The judicial warrant assures the person whose property is to be searched or seized of the legality of the intrusion; of the purpose of the search; *of the scope, object and lawful limit of the search; and of the point beyond which the search may not lawfully proceed. Michigan* v. *Tyler,* 436 U.S. 499, 507-508 (1978); *Marshall* v. *Barlow's, Inc., supra,* at 436 U.S. 323; *United States* v. *Chadwick, supra,* at 433 U.S. 9; *Camara* v. *Municipal Court, supra,* at 387 U.S. 532. This important purpose of a warrant can only be fulfilled in a meaningful way if the warrant describes with particularity the items to be seized and only if that description is part of the warrant at the commencement of the search.

The Fourth Amendment mandates in plain and precise language that " . . . no warrants shall *issue,* but upon probable cause . . . and particularly describing the . . . things to be seized." (Emphasis added). It does *not* say, "no warrants shall issue, but upon probable cause . . . and particularly describing the things to be seized, unless the judge who issues the warrant is to be present when it is

[18] The seizure of mannequins, clothing, tear gas cannisters, business records, rubber goods and a ring toss game, ostensibly under authority of this warrant, amply demonstrates this point.

executed for the purpose of deciding which items are to be seized." Nor does it say that a warrant which lacks particularity may issue if, after the search and seizure, a specific description of the items that were seized is added to the warrant. The suggestion that a general warrant may be upheld if the judge who issued it participates in its execution or if, after the search and seizure under it, a specific description of the items seized is added to it, is not only unfaithful to the unambiguous language of the Fourth Amendment but it demonstrates the timeliness today of the admonition first given by this Court long ago in *Boyd* v. *United States,* 116 U.S. 616 at 635 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . .
>
> " . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In the present case, there issued a warrant which did not particularly describe the things to be seized, in violation of the clear language of the Fourth Amendment. As a result, the petitioner's motion to suppress the evidence obtained under authority of that warrant should have been granted by the courts of New York. Since it was not, and since petitioner's conviction thereby resulted, it is the duty of this Court to correct this constitutional error by reversing petitioner's conviction.

III.

THE JUDGE'S EXAMINATION AT PETITIONER'S STORE OF SMALL PORTIONS OF EACH OF HUNDREDS OF FILMS AND PUBLICATIONS WAS AN INSUFFICIENT BASIS UPON WHICH TO ORDER THEIR SEIZURE.

As has been already noted in this brief, this Court has demanded scrupulous adherence to stringent procedural requirements by the states when they exercise the search and seizure power in the course of enforcing laws prohibiting the dissemination of obscene materials. *Marcus, supra; A Quantity of Books, supra; Lee Art Theatre, supra; Roaden, supra; Heller, supra.* In fulfillment of its constitutional obligation to uphold the First and Fourteenth Amendments in the cases brought before it, this Court has refused to uphold any state procedure which lacks the necessary safeguards "to assure nonobscene material the constitutional protection to which it is entitled. . . ." *Marcus, supra,* at 367 U.S. 731. Thus, this Court has insisted upon procedures designed to focus searchingly on the question of obscenity prior to seizure of expressive material. *Marcus, supra; A Quantity of Books, supra; Lee Art Theatre, supra.* The present case is one in which the procedure employed for the seizure of allegedly obscene materials was constitutionally defective at every step of the way, for, aside from the constitutional deficiencies that have already been outlined in the foregoing pages, the method by which Judge O'Connor made his on-the-spot determination as to what materials should be seized from petitioner's store was neither adequate to protect nonobscene material nor designed to focus searchingly on the question of obscenity.

In the present case, Judge O'Connor ordered the seizure of all copies of hundreds of films, magazines and books without having inspected a single publication in its entirety and without having viewed a single film in its entirety. Indeed, his "inspection" of the materials was not an inspection at all, but rather consisted entirely of hasty and superficial glances at small fragments of the publications and films which he ordered removed from the marketplace. With respect to the films being exhibited to the public in the booth area of petitioner's store, he devoted two to three minutes to an examination of a small part of each film (Tr. 97). He spent two to five minutes viewing fragments of the films being exhibited to the public in the two rear rooms of the petitioner's store (Tr. 16-17; 98). In the case of each of the hundreds of books and magazines which he ordered seized, it took the judge between two and ten seconds to glance at no more than a half dozen pages of each publication and to determine the question of constitutional law presented by each publication—whether there was probable cause to believe that it was outside the protection of the First Amendment (Tr. 98). With respect to the films located behind the glass case in the counter area of the petitioner's store, the judge did not view even a single frame of any of the 200-foot films; rather, he determined that all of them were obscene solely on the basis of looking at the small still photograph on each of the boxes in which the films were contained (Tr. 36-38, 123-124).

Moreover, throughout the entire episode, the judge applied a definition of obscenity which he was unable to recite at the motion hearing, but which was sufficiently flexible to bring within its dragnet articles of clothing, which he found to be obscene because the clothing was displayed in such a way as "to arouse sexuality," in that it was uncom-

monly "frilly" and not the type he ". . . would find [his] wife buying" (Tr. 99-104). Nor, petitioner submits, was the judge acting as a neutral and detached magistrate when he made his determinations of obscenity at the petitioner's store. Rather, he had joined forces with the police department and prosecutor's office in conducting a massive raid on the petitioner's business establishment, a raid in which he was a full and zealous participant. But, putting aside the question of the judge's neutrality and disregarding the question as to whether the judge even knew the correct definition of obscenity,[19] still the judge's hasty examination of small fragments of the materials seized from petitioner's store did not constitute a focusing search on the question of obscenity and could not have formed either an appropriate or logical basis on which to rest a finding of probable obscenity.

Under this Court's decision in *Miller* v. *California*, 413 U.S. 15, 24 (1973), a work may be found obscene only if the three-pronged test set forth in that decision is met:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, [citation omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

[19] Under New York law, a person need not be a lawyer in order to occupy the office of town justice. *See* N.Y. Uniform Justice Court Act, Art. 1, §105 (McKinney Supp. 1978-1979). As it happened, the judge who directed the search and seizure in this case was not a lawyer. *See* letter attached as Exhibit A to this brief, *infra*, at 51.

Because the first and third prongs of the *Miller* test expressly require a consideration of the work as a whole, it necessarily follows that a finding of probable cause to believe that a particular work meets those criteria cannot logically be based upon a mere inspection of fragmented and isolated parts of the work. At most, an inspection of a small part of a publication or film could give a magistrate cause to believe that the "work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," the second prong of the *Miller* test. But it would be hopelessly contradictory for a magistrate to conclude from a brief inspection of a small fragment of a particular film or publication that probably "the average person . . . would find that the work, *taken as a whole,* appeals to the prurient interest," the first prong of the *Miller* test. Certainly, it would defy reason and logic for a magistrate, who has glimpsed briefly only at a minute portion of a publication or film, to conclude that there is probable cause to believe that the "work, *taken as a whole,* lacks serious literary, artistic, political, or scientific value," the third criterion which, under *Miller*, must be met before a work may be deemed obscene. *See United States* v. *Tupler*, 564 F. 2d 1294 (9th Cir. 1977). Only by considering a publication or film as a whole can a magistrate properly determine whether the work is probably beyond the protection of the First Amendment and thereby fulfill his constitutional duty to focus searchingly on the question of obscenity.[20]

Furthermore, the approval of a more relaxed standard of judicial scrutiny as a prerequisite to a lawful seizure of allegedly obscene materials would afford insufficient

[20] Compliance by magistrates with this requirement is neither difficult nor unduly burdensome in light of the First Amendment values at stake.

protection to nonobscene material. There is undoubtedly a vast bulk of materials available in the marketplace which is entitled to full constitutional protection but which, nevertheless, might satisfy the second component of the *Miller* test of obscenity, because it depicts or describes sexual conduct. In a large number of cases, therefore, it is only a proper application of the first and third prongs of the *Miller* formulation which will separate works that legitimately deal with "sex, a great and mysterious motive force in human life, [which] has indisputably been a subject of absorbing interest to mankind through the ages," *Roth* v. *United States*, 354 U.S. 476, 487 (1957), from those works that treat sex in a manner which places them beyond the protection of the First Amendment. For this reason, the approval of a procedure, such as the one followed in this case, which is sufficient to enable a magistrate to determine only that the second part of the *Miller* test may be satisfied, but which is clearly insufficient to enable him to make an informed and deliberate determination as to whether the first or third prongs of the *Miller* test are met would place in jeopardy a large category of protected materials. The approval of such a procedure would transform the requirement of a focusing search on the question of obscenity, fashioned by this Court as the "sensitive tool" [21] by use of which magistrates can locate the "dim and uncertain line" [22] which often separates obscenity from constitutionally protected speech, into an undiscriminating blunt instrument.[23]

[21] *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

[22] *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963).

[23] Permitting seizure of an allegedly obscene book or film on the basis of a hasty and superficial judicial examination of a small fragment of the book or film would also signal a return to the principle of *Regina* v. *Hicklin* [1868] L.R. 3 Q.B. 360, rejected by this Court in *Roth, supra*, that obscenity is to be judged not by considering the effect of the work as a whole but by the effect of isolated excerpts of the work.

In the present case, the seizure of publications and films was effected under a constitutionally defective procedure which was neither designed to focus searchingly on the question of obscenity nor adequate to protect nonobscene materials. The seizure, therefore, violated petitioner's First, Fourth and Fourteenth Amendment rights, for which reason the petitioner's conviction, based upon evidence unlawfully seized, should be reversed by this Court.

IV.

THE MASSIVE SEIZURE OF PUBLICATIONS, FILMS AND PROJECTORS VIOLATED PETITIONER'S FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

This Court has had occasion to condemn, as impermissible prior restraints on the distribution of materials presumptively protected by the First Amendment, seizures of multiple copies of allegedly obscene materials under search warrants which issued on an *ex parte* basis. *Marcus, supra; A Quantity of Books, supra.* This Court has properly determined that only a judicial finding of obscenity following an adversary hearing assures the "necessary sensitivity to freedom of expression" [24] which is a prerequisite to the imposition of any valid final restraint on the distribution of expressive materials. And the Court has recognized that the seizure of all copies of a particular film or publication represents the most effective and repressive final restraint possible. *Marcus, supra,* at 367 U.S. 736; *A Quantity of Books, supra,* at 378 U.S. 210. Consequently, such a seizure is unlawful unless it is preceded by an adversary hearing on the question of obscenity. *Id.*

[24] *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965); *See also, United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971).

In the present case, the conduct of the eleven state officials who raided petitioner's store far exceeded that which could have even arguably furthered any legitimate law enforcement purpose. The seizure of films and publications at petitioner's store was not limited to the single evidentiary copy of each needed for prosecution. Rather, the state officials, in a systematic and calculated fashion, seized every available copy of each publication and film believed to be obscene. The only purpose served by this mass seizure was an illegal purpose—to put an abrupt and complete halt to the circulation of numerous books, magazines and films. As this Court noted in *Heller, supra,* at 413 U.S. 491-492:

> ". . . Courts will scrutinize any large-scale seizure of books, films or other materials presumptively protected under the First Amendment to be certain that the requirements of *A Quantity of Books* and *Marcus* are fully met . . .
>
> ". . . [S]eizing films to destroy them *or to block their distribution or exhibition* is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding. . . ." (Emphasis added).

Here, the purpose of the state officials was clear. When they entered petitioner's store under a warrant which specifically identified only two films, they already had in their possession evidentiary copies of those films. Nevertheless, they seized every other copy of each of those films that could be found. They confiscated all of the petitioner's film projectors, a seizure akin to and no less repressive than the seizure of a printing press, for it imposed a prior restraint on the exhibition of *any* film by the petitioner, regardless of content.[25] During the six-hour search and seizure, they effectively padlocked petitioner's entire premises by harassing potential customers, and by stationing uniformed guards both inside and outside of the store.[26] Finally, they carted away every copy of every film found in petitioner's store and every copy of a substantial portion of the books and magazines in petitioner's store, more than 860 films and publications in all. The search and seizure was clearly unlawful under the First and Fourteenth Amendments because it imposed a prior restraint on the circulation and exhibition of numerous films and publications.

As a consequence, the petitioner's conviction ought to be reversed, just as the judgments in *Marcus* and *A Quantity of Books* were reversed by this Court. In those cases, both involving proceedings instituted to obtain a judgment ordering the destruction of obscene materials, this Court reversed the judgments in order to vindicate the First and Fourteenth Amendment rights that had been abridged by the mass seizures of allegedly obscene materials. As this Court stated in *A Quantity of Books, supra, at* 378 U.S. 213:

> ". . . Here, as in Marcus, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights' [cite omitted] the judgment resting on a finding of obscenity must be reversed."

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[25] See *Dexter* v. *Butler,* 559 F. 2d 1286, 1293 (5th Cir. 1977), *aff'd. on rehearing,* —— F. 2d —— (1978); *Ellwest Stereo Theatre, Inc.* v. *Byrd,* 404 F. Supp. 33, 51 (S.D. Tex. 1975); *Bongiovanni* v. *Hogan,* 309 F. Supp. 1364 (S.D. N.Y. 1970).

[26] See *Maguin* v. *Miller,* 433 F. Supp. 223 (D. Kan. 1977); *P.A.B., Inc.* v. *Stack,* 440 F. Supp. 937 (S.D. Fla. 1977).

Since a violation of the Fourteenth Amendment infected the proceedings in the present case as well, this Court should accord the petitioner here equal treatment by reversing the judgment of conviction.

Moreover, the petitioner's conviction ought to be reversed because the mass seizure of materials from its store violated its Fourth Amendment rights as well as its First Amendment rights. This is the teaching of *Roaden* v. *Kentucky*, 413 U.S. 496 (1973). In that case, this Court found the warrantless seizure of a film being exhibited to the general public to be violative of the Fourth Amendment. An analysis of *Marcus, supra, A Quantity of Books, supra,* and *Lee Art Theatre, supra,* led this Court to conclude that a search or seizure which effects a prior restraint on the right of expression ". . . calls for a higher hurdle in the evaluation of reasonableness" under the Fourth Amendment. *Roaden, supra,* at 413 U.S. 504. In *Roaden,* that hurdle could not be overcome.

In the present case as well, the massive seizure which occurred cannot withstand the close scrutiny demanded in assessing its reasonableness under the Fourth Amendment. Indeed, in order to sustain the mass seizure in this case under the Fourth Amendment, it would be necessary for this Court to conclude that a search and seizure which is clearly in violation of the First Amendment may, nevertheless, constitute a reasonable search and seizure within the meaning of the Fourth Amendment. That this Court would ever arrive at such a conclusion is unthinkable. Because the massive seizure in this case violated the Fourth Amendment as well as the First, the petitioner's motion to suppress should have been granted by the trial court and the petitioner's conviction, based on constitutional error, should be reversed by this Court.

CONCLUSION

The record below demonstrates an assault of monumental proportions upon clearly established principles of search and seizure protections guaranteed by the First, Fourth and Fourteenth Amendments.

Under the pretext of seeking two films which were already in their possession, the law enforcement authorities of New York sought to convert what was essentially a warrantless rummaging of private premises and effects into the appearance of a structured search under the authorization of a precise warrant.

They bypassed the necessity for particularly identifying the items to be seized by appending fourteen pages of a precise catalog of seized materials to a "warrant", originally issued and executed in blank, long after the government entry onto petitioner's premises, the arrest of an employee, and the search for, and seizure of, massive amounts of materials had been completed.

By the simple but dangerous device of transporting a compliant magistrate on wheels to the place of the search to give the illusion of quasi-judicial imprimatur to the massive rummaging of the police, they dispensed with the requirement that probable cause must be shown as a prerequisite to a search with or without a warrant.

Nor did they demonstrate any concern for the clear, constitutional imperative that, where a search and seizure involves materials claiming First Amendment protection, the issuing magistrate must focus searchingly on the obscenity of such materials in advance. Rather, they sought to justify the massive seizure of hundreds of publications

and films by a superficial examination characterized by failure to examine any of the materials as a whole or in their entirety, made by a judicial figure whose identification with the procedures and purposes of the searching officers was unwavering, and whose standards of obscenity by which he judged the materials before him, are unknown to the annals of law.

That the record in this case demonstrates such callous disregard for civilized limitations upon governmental behavior by the law enforcement authorities of New York is disturbing enough. But that every judicial tribunal of that state, from trial level through the highest appellate stages, would sanction such usurpation of basic constitutional principle, defies understanding, to say the least.

It is ironic that in the context of a massive seizure of materials arguably protected by the First Amendment, where search procedures "call for a higher hurdle in the evaluation of reasonableness" [27] than searches involving other kinds of evidence, and where the particular identification in warrants of things to be seized "is to be accorded the most scrupulous exactitude",[28] the seeds of full-scale emasculation of basic Fourth Amendment guarantees are now presented to this Court for review.

For if the judicial sanction of this search procedure by the courts of New York should be perpetuated by this Court, then the clear command of the Fourth Amendment which interposes between the police and the privacy of our citizens an impartial magistrate, a prior showing of probable cause, and a particular description of items to be seized, will become a mockery. From that day forward,

[27] *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973).

[28] *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965).

pseudo-magistrates making house calls, arm in arm with searching police officers, blank warrants in their fists, will justify their rummaging efforts by after-the-fact identification of what the search has turned up. Thus will the Fourth Amendment, and the First Amendment in the process, be reduced to rubble.

Against such a consequence, this Court should resolutely set its face. The conviction should be reversed.

Respectfully submitted,

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January, 1979

APPENDIX

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

New York Penal Law, Section 235.00:

§ 235.00 *Obscenity; definitions of terms.*

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. 'Obscene.' Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or

simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. 'Material' means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

5. 'Wholesale promote' means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same for purposes of resale.

6. 'Simulated' means the explicit depiction or description of any of the types of conduct set forth in clause (b) of subdivision one of this section, which creates the appearance of such conduct.

7. 'Sodomy' means any of the types of sexual conduct defined in subdivision two of section 130.00

provided, however, that in any prosecution under this article the marital status of the persons engaged in such conduct shall be irrelevant and shall not be considered."

New York Penal Law, Section 235.05:

"§ 235.05 *Obscenity in the second degree.*

A person is guilty of obscenity in the second degree when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity in the second degree is a class A misdemeanor."

New York Criminal Procedure Law, Section 710.70(2):

"§ 710.70 *Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion*

• • • • •

2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty."

STATE OF NEW YORK
OFFICE OF COURT ADMINISTRATION
270 BROADWAY
NEW YORK, N.Y. 10007

RICHARD J. BARTLETT
CHIEF ADMINISTRATIVE JUDGE

MICHAEL R. JUVILER
COUNSEL

January 15, 1979

Lita Weiss, Esq.
Berkman, Gordon, Kancelbaum
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2121 The Illuminating Building
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Cleveland, Ohio 44113

Dear Ms. Weiss:

Your inquiry of January 4, 1979, addressed to the Clerk of the Court, Appellate Division, Third Judicial Department has been referred to this Office for reply.

Our files indicate that Honorable John O'Connor and Honorable Frank L. Giza, Justices of the Town Court, Town of Waywayanda, Orange County, New York, occupied that office during the year 1976.

Neither justice is a lawyer but both have fulfilled the training requirements established by statute and by the Office of Court Administration.

I trust this information will be of assistance to you.

Sincerely,

William Bulman

William Bulman
Deputy Counsel

WB:mg

Exhibit A

Supreme Court, U. S.
FILED
FEB 27 1979
MICHAEL RODAK, JR., CLERK

78-511

IN THE

Supreme Court of the United States

October Term, 1978

LO-JI SALES, INC.,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS.

BRIEF OF RESPONDENT.

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IN THE

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OCTOBER TERM, 1979.

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STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS.

BRIEF FOR RESPONDENT.

Procedural History.

On July 15, 1976, Lo-Ji Sales Inc., (hereinafter petitioner), was charged by Investigator J. A. Hurbanek of the New York State Police with committing on June 25, 1976, three (3) counts of the crime of Obscenity in the Second Degree, in violation of the provisions of Section 235.05, Subdivision 1 of the Penal Law of the State of New York. The subject of the first count was approximately 400 books possessed in the front room of petitioner's store. The subject of the second count was approximately 474 reels of movie film possessed in the counter area of the

front room of petitioner's store. The subject of the third count was 26 movie projectors with films possessed in the front and rear rooms of the petitioner's store.

By Notice of Motion dated July 29, 1976, petitioner, through trial counsel, Kassner and Detsky, P.C., moved to suppress the evidence which made up the subject matters of all three counts of Obscenity. In a Memorandum of Law dated August 2, 1978, the People of the State of New York, (hereinafter respondents), consented to the holding of a hearing to determine the factual issues raised by the petitioner's motion. With the consent of both parties, this hearing was scheduled to be heard before Judge O'Connor on August 27, 1976, at 2:00 p.m. By Notice of Motion dated August 24, 1976, petitioner asked Judge O'Connor to disqualify himself on the grounds that petitioner intended to call the Judge as a witness. On August 27, 1976, at 2:00 p.m., Judge O'Connor disqualified himself and in his place Judge Giza continued the hearing. On November 22, 1976, Judge Giza denied petitioner's motion to suppress on all three (3) counts.

On February 3, 1977, petitioner, through trial counsel, pleaded guilty to all three (3) counts of Obscenity in the Second Degree. Petitioner was fined $1,000 on each count, for a total of $3,000. Recently, petitioner paid its fine in full.

The remainder of the procedural history is adequately set forth in petitioner's brief.

Facts.

On June 20, 1976, Investigator Hurbanek entered petitioner's store in Wawayanda, Orange County, New York, and purchased from Mr. Alex Mandakis, the clerk of petitioner's store, two (2) films entitled *Linda and Duke*

and *Four For Dinner*.[1] (TR-22)[2] At this time the Investigator observed other reels of film and magazines beting displayed to the public (A-6).[3] While in the store the Investigator had conversations with Mr. Mandakis (A-6, A-7). Based upon these conversations and his observations, he learned that the other films and magazines portrayed or depicted similar activities as were in the films which he purchased (A-6, A-7). After purchasing these two films, Investigator Hurbanek viewed both of them (A-6). He observed that the film entitled *Linda and Duke* contained acts of female masturbation and beastality involving a dog and a female (A-6). He observed that the film entitled *Four For Dinner* contained acts of sexual intercourse, sodomy, fellation, cunnilingus and masturbation (A-6).

Thereafter, Investigator Hurbanek asked Judge O'Connor, Town Justice, Town of Wawayanda, Orange County, New York, to come to the Orange County District Attorney's Office, Goshen, New York, to view these films so that Judge O'Connor could independently determine whether or not there was reasonable cause to believe that these two (2) films were obscene[4] (TR-3, 4, 5, 6).

---

[1]Mr. Mandakis was charged with violating the New York State Penal Law for selling Investigator Hurbanek these two films. He pled guilty to the violation of Disorderly Conduct and was sentenced to a conditional discharge at the same time the petitioner pled guilty to the three counts of Obscenity in the Second Degree. Mr. Mandakis never appealed his conviction of Disorderly Conduct.

[2]TR refers to Trial Record page numbers.

[3]A refers to Appendix page numbers.

[4]Throughout this brief, respondent will use the word obscene as a legal shorthand meaning the definition of the word as found in the New York State Penal Law Section 235.00, Subdivision 1.

On June 25, 1976, at approximately 9:00 a.m., Judge O'Connor viewed both films in their entirety at the Orange County District Attorney's Office (TR 5, 84, 105). Thereafter, Investigator Hurbanek asked Judge O'Connor to accompany him to petitioner's store so that the Judge could independently determine whether or not there was reasonable cause to believe that the material being offered to the public for sale was obscene (TR 7, 84).

At approximately 10:30 a.m. in the Town of Wawayanda, Investigator Hurbanek signed the affidavit in support of the search warrant in the case at bar, and Judge O'Connor then issued and signed the search warrant (TR 7, 86, 93). Petitioner in his brief of pages 6 and 7 shows how the search warrant appeared at the time that Judge O'Connor signed it. At the same time that the Judge signed the search warrant, he also signed a warrant for the arrest of Mr. Mandakis for selling Investigator Hurbanek the two (2) above-entitled films on June 20, 1976 (TR 6, 7). At approximately 11:13 a.m., Judge O'Connor, Investigator Hurbanek and three (3) other investigators and three (3) uniformed members of the New York State Police entered petitioner's store (TR 11, 69, 70). Investigator Hurbanek told Mr. Mandakis that he had a warrant for Mr. Mandakis' arrest, and that Judge O'Connor was there to view materials being sold to the public to determine whether or not there was reasonable cause to believe that any of these materials were obscene (TR 12). Investigator Hurbanek also advised Mr. Mandakis of all his constitutional rights, and showed Mr. Mandakis a copy of the search warrant (TR 10, 11, 12). Investigator Hurbanek told Mr. Mandakis that the Judge desired to view movies being shown to the public in booths in the main room of the store (TR 13). Investigator Hurbanek asked Mr. Mandakis if he had change for the Judge to view all the films in each booth, and Mr. Mandakis volunteered to turn the projectors on automatically in order to expedite the search (TR 13). Mr. Mandakis then voluntarily went to the back section of one of the booths and adjusted the wires so that the Judge could view the film being shown in each booth without using any money (TR 14). The Judge then viewed 23 of 24 films being shown to the public in coin-operated machines in the front of petitioner's store[5] (TR 14, 15). These films did not have any sound (A 17, 18, 19). The Judge viewed between two (2) and three (3) minutes of each eight (8) millimeter film until he was satisfied that there was reasonable cause to believe that each film was obscene (TR 97). While viewing the films, the Judge dictated to Investigator Hurbanek what he saw (TR 14, 15). Upon being satisfied that there was reasonable cause to believe that the film was obscene, he orally directed that the police seize the films and projectors (TR 15).

The Judge next went to the rear rooms of the store which contained four (4) coin-operated machines exhibiting films to the public[6] (TR 16). Some of these films had sound (TR 16). Again, Mr. Mandakis voluntarily automated each booth so that the Judge could view the film without using money (TR 17). The Judge then viewed between two (2) and five (5) minutes of each of four (4) eight (8) millimeter films, and dictated to Investigator Hurbanek what he saw (TR 17, 98). After the Judge determined that there was reasonable cause to believe that the film in the projector was obscene, he orally directed the police to seize the projectors with the films (TR 17).

These 26 films and projectors made up the third count of the information charging the petitioner with the crime of Obscenity in the Second Degree.

---

[5]Respondent timed a random sample of these films and determined that each of the films was less than ten (10) minutes.

[6]Respondent viewed the film cartridges and saw that the cartridge claimed to contain fifteen (15) minutes of film.

After viewing the films being shown to the public in the rear room, the Judge returned to the front room of the store where books and magazines were being displayed to the public on three (3) walls and three (3) tables (TR 18, 20). Some of the magazines had clear plastic or cellophane wrapping entirely around them (TR 19). Since the Judge only has one arm, he asked two police officers to take the covers off the magazines (TR 19). The Judge then proceeded to look through the magazines on the three (3) walls and three (3) tables in the front room (TR 20). He spent no less than ten (10) to fifteen (15) seconds nor more than one (1) minute looking through any magazine (TR 38, 39). The only magazines that he directed the police to seize were those magazines comprised mainly of pictures with captions, so that he could view the magazine by just looking at the pictures and reading captions (TR 76, 128, 129). He did not review any magazine or book that had substantial amounts of written material or stories (TR 76). Accordingly, any magazine with substantial amounts of written material was not seized (TR 24, 76). If after looking at the pictures in the magazine and reading the captions, the Judge was satisfied that there was reasonable cause that the magazine was obscene, he directed the police to take each and every copy of the magazine being displayed to the public (TR 22). In all, the Judge directed the police to take approximately 400 magazines, which comprised the first count of the information charging the defendant with Obscenity in the Second Degree.[7]

[7]From the inventory return filed in the case the total number of magazines taken was 397; and these 397 magazines consisted of 268 different publications. The breakdown of the 397 magazines was as follows: 1 copy of 202; 2 copies of 37; 3 copies of 14; 4 copies of 4; 5 copies of 4; 6 copies of 3; 9 copies of 1; and 15 copies of 1.

After reviewing the magazines, the Judge proceeded to a counter in the front of the store which contained films in boxes (TR 26). These films were being exhibited to the public and were for public sale (TR 26). On the outside of each box there was a still picture (TR 26). Some boxes also had a brief description of the film.[8] Investigator Hurbanek and the Judge told Mr. Mandakis that they were going to open the individual boxes to look at the film (TR 26). Mr. Mandakis told the Judge that it was not necessary to open the boxes to see what the film inside contained because the photo on the outside of the box showed what the movie in the box was all about (TR 26). Mr. Mandakis further told the police that all the boxes contained "sex films" (TR 26). After hearing this information, Judge O'Connor only looked at the picture on the outside of each box (TR 26). If he was satisfied from the picture and Mr. Mandakis' admission that there was reasonable cause to believe that the film in the box was obscene, he directed the police to seize each box containing that film (TR 26). The police seized approximately 474 eight (8) millimeter films in boxes from this area of the store. This made up the second count of the information.[9]

While Judge O'Connor reviewed the magazines and films, Investigator Hurbanek took down the title of each film or magazine that the Judge directed be seized (TR 90).

[8]Respondent learned this information from looking at the items.

[9]From the inventory return filed in the case the total number of reels of film taken was 431; and these 431 reels of film consisted of 351 different movies. The break down of the 431 reels of film is as follows: 1 copy of 288; 2 copies of 53; 3 copies of 5; 4 copies of 4; and 6 copies of 1.

After looking at the boxes by the front counter, the Judge observed mannequins on display with "frilly" clothing and "rubber" products being offered for sale to the public in the front room of petitioner's store (TR 27, 153). If the Judge felt that there was reasonable cause to believe that this product was legally obscene, he directed the police to seize it (TR 27). Petitioner was not specifically charged with any crime for possessing any rubber material or mannequins.

The Judge left petitioner's store at approximately 5:00 p.m. (TR 28). The police took all the items which were seized at the Judge's direction to New York State Police Barracks in Middletown, New York (TR 70, 71, 72). Between 5:30 p.m. and 11:00 p.m. members of the New York State Police, with the assistance of stenographers from the Orange County District Attorney's Office, listed on the search warrant and on the inventory all the items that the Judge had orally directed to the police to seize (TR 46, 47). Investigator Hurbanek then brought the completed search warrant to the Judge that evening (TR 84).

During the entire period that the Judge and the State Police officers were in the petitioner's store, the store was open to the public (TR 28). Customers were free to enter the store throughout the day, but at the request of Mr. Mandakis would not have been allowed to view the movies when the machines had been automated (TR 50, 51, 74). The only reason the police were taking names of people who came to the store was to have a list of potential witnesses (TR 74, 75, 77). Mr. Mandakis was permitted to move freely throughout the store during the entire day but would not have been allowed to exit from the store if he wished to do so (TR 29, 31, 51, 52, 120, 134, 135).

On June 26, 1976, the day after the Judge and the State Police were in the store, petitioner's store was again open for public business (TR 28, 29).

ARGUMENT.

POINT I.

The search for and seizure of items other than the two films identified in the warrant at the time of its issuance was constitutionally proper because under the Fourth Amendment petitioner had no reasonable expectation of privacy against governmental intrusion concerning these items since all the items were being displayed to the general public in areas of petitioner's store open to the general public.

At the outset it must be emphasized that this case only involves alleged violations of the Fourth Amendment. By its plea of guilty, petitioner admitted that all items seized which formed the subject of the three (3) separate charges, were in fact obscene.

In Points I and II petitioner argues that the search and seizure in the case at bar violated the Fourth Amendmen for three (3) reasons. First, the search and seizure was conducted without a warrant. Second, if the Court were to determine that the search and seizure was conducted with a warrant; then there was no probable cause to search established in the affidavit in support of the warrant. Third, if the search and seizure was conducted with a warrant, then the warrant was in fact a general warrant. Since respondent submits that these three (3) reasons are wrong because the Fourth Amendment only protects reasonable expectations of privacy, respondent will answer all three (3) reasons in one point.

In prior cases this Court has stated the history and purpose of the Fourth Amendment, *Boyd v. United States,* 116 U. S. 616, 625, 630 (1886); *Marcus v. Search Warrant,* 367 U. S. 717, 724-729 (1961). In *Boyd v. United States, supra,* on page 630, Mr. Justice Bradley declared:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

As recently as last term, this Court reaffirmed that the Fourth Amendment only protected people's legitimate and reasonable expectations of privacy from governmental intrusions, *Rakas v. Illinois,* U. S. (1978); 58 L. Ed. 2d 387.

> *Katz v. United States,* 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967), provides guidance in defining the scope of the interest protected by the Fourth Amendment. In the course of repudiating the doctrine derived from *Olmstead v. United States,* 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928), and *Goldman v. United States,* 316 US 129, 86 L Ed 1322, 62 S Ct 993 (1942), that if police officers had not been guilty of a common-law trespass they were not prohibited by the Fourth Amendment from eavesdropping, the Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. 889 US, at 353, 19 L Ed 2d

> 576, 88 S Ct 507; see *United States v. Chadwick,* 433 US 1, 7, 53 L Ed 2d 538, 97 S Ct 2476 (1977); *United States v. White,* 401 US 745, 752, 28 L Ed 2d 453, 91 S Ct 1122 (1971). *Rakas v. Illinois, supra,* 401.

"(T)he Warrant Clause (of the Fourth Amendment) makes a significant contribution to the protection," *United States v. Chadwick, supra,* 7. Mr. Justice Stewart summarized the importance and purpose of the Warrant Clause, *Chimel v. California,* 395 U.S. 752, 761-762 (1969):

> As the Court put it in *McDonald v. United States,* 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153: "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed to precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. • • • And so the Constitution requires a magistrate to pass on the desire of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. *Id.,* at 455-456, 69 C. Ct., at 193.

Thus it can be seen that one of the underlying purposes of the Fourth Amendment is to place a neutral and detached magistrate between our citizen's reasonable expectations of privacy and members of law enforcement

entrusted with the "competitive job of ferreting out crime", in order to insure that law enforcement officers do not illegally invade a person's private domain. It follows that if a person has no reasonable expectation of privacy about certain items in certain areas, then the Fourth Amendment does not protect him from law enforcement's search of that area for those items. *Rakas v. Illinois, supra; Katz v. United States, supra.*

Thus, even if this Court were to accept petitioner's triple argument that the warrant in the case at bar was no warrant at all, or that it was a general warrant at the time of its issuance, or that it was not based upon probable cause to search the store (and respondent is not conceding any of this by merely restating petitioner's argument); if petitioner had no reasonable expectation of privacy from governmental intrusions into the area of his store in which the search was conducted for the films and magazines, then the Judge's initial viewing of the films and magazines was constitutionally proper, *Rakas v. Illinois, supra.* In the case at bar, respondent respectfully submits that petitioner has no reasonable expectation of privacy as to any of the items searched for because petitioner was exhibiting all these items to the general public. The parts of the store where the Judge viewed the films and magazines in question were open to any member of the general public. Rather than expecting these items to remain private, it was petitioner's purpose, desire, hope and expectation that members of the general public would look throughout the front and back room of his store at the items being displayed there and then purchase or view the same.

The fact that petitioner may or may not have expected a Town Justice to enter his store to view the items being displayed to the general public is totally irrelevant:

> *Hoffa v. United States,* 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966) which was left undisturbed by Katz, held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States,* at 302, 87 S. Ct., at 413. No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, *Lewis v. United States,* 385 U.S. 206, 87 C. Ct. 424, 17 L. Ed. 2d 312 (1966), or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. *Lopez v. United States,* 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963). *United States v. White, supra,* 749.

Under *Roaden v. Kentucky,* 413 U.S. 496 (1973); *Lee Art Theater, Inc., v. Virgnia,* 392 U.S. 636 (1968); *Marcus v. Search Warrant, supra,* a law enforcement official may not decide for himself whether or not there is probable cause to believe an item is obscene. However, these cases do not hold that a law enforcement official may not enter a store, which is open to the public or go into a movie upon paying the admission price, and look at what is being displayed to the general public.

If a law enforcement official may do this, then it follows *a fortiori* that a neutral and detached magistrate may also enter a store or theater.

In the case at bar, the Justice of the Peace entered the store during business hours when it was open to the general public, and contrary to petitioner's allegations, only viewed items being displayed to the general public in areas open to the general public. Upon entering the store, Mr. Mandakis was informed that the police had a warrant for his arrest and that the Judge was there to view items being displayed to the public to determine whether or not any of these items were obscene. Mr. Mandakis was permitted to move freely throughout the store during the entire day. The store was never closed to the public and Mr. Mandakis, who realized this fact, told Investigator Hurbanek and the Judge, when he voluntarily activated the movie machines that he didn't want customers who might enter the store to get a free view of the movies. The police officers who were stationed at the front door and were assigned to take the name of any person entering the store, were not taking these names in order to harass these people, or to close the store. In the case at bar, the state police officer assigned to the door had a legitimate reason to learn the name of every person entering the store while the Judge was viewing items, because this person was a potential witness at a suppression hearing. Certainly the police must be expected and permitted to record the names of potential witnesses.

Petitioner wrongly characterizes the role of Judge O'Connor as an agent of the police. While it is true that both the Judge and members of the New York State Police are paid by the State of New York that fact does not make the Judge an agent of the police. If it did,

then all our state legislatures and state judges would be agents of the state police. As stated above, the purpose of the Warrant Clause of the Fourth Amendment is to place a neutral and detached magistrate between our citizency and members of law enforcement, and to thereby limit *law enforcement's* right to rummage through people's belongings, *Chimel v. California, supra.* Whenever any judge reviews a warrant and affidavit in support thereof and then issues a warrant he is assisting law enforcement in one sense. Without his authorization they can't gather evidence but with it they can, *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). However, the mere fact that the Judge assists law enforcement in this manner does not make him an agent of law enforcement. Our Constitution not only envisioned this type of assistance and interaction, but also the Warrant Clause of the Fourth Amendment expressly authorized it. The fact that the Judge went to the store and viewed many items does not change his role as Judge. Rather, it is a result of the more stringent requirements of our Constitution when the search and seizure concerns expressive material, *Heller v. New York,* 413 U.S. 483 (1973); *Roaden v. Kentucky, supra; Marcus v. Search Warrant, supra.*

In the state courts petitioner never showed by any evidence that Judge O'Connor was not neutral and detached. The facts adduced at the hearing demonstrate beyond any question that Judge O'Connor acted in a neutral and detached manner in reviewing the items. He reviewed every item on his own, and he only directed the police to seize some of the items that he had reviewed.

This is not a case where the police conducted a search and seizure without a warrant or with a general warrant. The vice of a warrantless search and seizure or one conducted under a general warrant is that *members of law*

enforcement search wherever they want and seize whatever they want. The whole purpose of a warrant is that it limits where *the police* may search and what they may seize. In the case at bar, the search was limited to areas open to the general public. In the case at bar, law enforcement's power to seize was completely and totally limited by the Judge's oral instructions.

While normally the instructions limiting what may be seized and the underlying facts stating probable cause for the search and seizure are recorded in the warrant before members of law enforcement enter the area to be searched, both New York and Federal Law now permit oral applications in support of search warrants, Federal Rules of Criminal Procedure 41 (c) (2); *People v. Brown,* 40 N.Y. 2d 183 (1976). Similarly, respondent submits that where law enforcement may not review the items on their own to determine probable cause, and where the items may quickly disappear, the exigency of the circumstances compel the conclusion that there is no legal or logical reason why the instruction on what to seize may not be oral, when the Judge is at the scene as long as what is seized is recorded.

Part of petitioner's argument is that the Judge lacked probable cause to search for and seize the items which petitioner displayed to the public at the time of issuance of the warrant. From this premise petitioner argues that if the Judge lacked probable cause to search at the time of issuance, then he also lacked probable cause to seize.

The underlying fallacy in petitioner's argument is that he assumes that the search and seizure are contemporaneous and identical and thus based upon the same probable cause. However, in many Fourth Amendment

controversies the probable cause to search is not identical to the probable cause to seize. In many Fourth Amendment controversies the, probable cause to search proceeds, and is independent from the probable cause to seize. It is entirely possible for there to be no probable cause to seize at the time of the search or viewing, but for the probable cause to seize to develop during the search or viewing and thus be present at the time of the actual seizure. The plain view exception to the warrant requirement is one example of this situation, *Coolidge v. New Hampshire, supra,* 465. A police officer who is lawfully in an area, whether by warrant or invitation or otherwise, may seize an item upon *inadvertantly* seeing it if it is in plain view. This means that when the officer went to the area, he had no probable cause to seize the item or to believe that it was there, otherwise he would have had to obtain a warrant, *Coolidge v. New Hampshire, supra;* but upon seeing the item the officer realizes its significance and thus has probable cause, to seize it at the time that it is taken. Further, in some Fourth Amendment controversies probable cause to search is never an issue only probable cause to seize is, *Heller v. New York, supra.*

By keeping in mind that the search and the seizure of items are separate and distinct steps and in analyzing the case at bar in this way, it will be seen that there was no constitutional violation. The search consisted of the Judge's entry into the area of petitioner's store that was open to the general public and his viewing material being openly displayed to the general public in this area. It is respectfully submitted that the Fourth Amendment does not require probable cause to look at items being displayed to the general public in areas open to the general public because the owner of such items has no reasonable expectation of privacy as to those items, *Rakas v. Illinois, supra; Katz v. United States, supra.* In *Heller v. New*

York, supra, the Judge lawfully entered the theater and viewed the movie being displayed to the public. In *Heller v. New York, supra,* there was no claim that the Judge could not view or search for the movie at the time that he entered the theater even tho he had no probable cause at that time to believe that the movie being shown was obscene. The seizure in the case at bar occurred after the Judge had viewed the items and directed that certain of these items be seized. Similarly, the seizure in *Heller v. New York, supra,* occurred after the Judge viewed the films. In this case the Judge had signed a warrant prior to entering, while in *Heller* he did not. However, the fact that a Judge had a warrant prior to entry should not change the applicable principles. If it did, it would mean that the Judge could have entered the public areas of the store to look at what was being displayed to the public without a warrant, but by having a warrant his right to enter this area and view this material was for some reason extinguished. Certainly, the State should not be penalized by acting in good faith to protect citizen's rights and securing a warrant prior to entry. The basic scope of the Fourth Amendment is to protect citizens' legitimate reasonable expectations of privacy from governmental intrusion. If the citizen has no legitimate reasonable expectation of privacy about an item because he displays it to the general public in a public area, it makes no difference if the government agent enters and looks at this item with or without a warrant.

The cases cited by petitioner, *Heller v. New York, supra; Marcus v. Search Warrant, supra; Lee Art Theater, Inc., v. Virginia, supra,* all concern the issue of probable cause to seize. They in no way change or limit the right of a Judge or law enforcement to legally view (search) what is displayed to the public or in public areas. The protection afforded to those people who display expressive material to the public areas by the Fourth Amendment is that the Judge must first review the material before it is taken from the person.

POINT II.

The Judge's initial examination of the items in petitioner's store was not insufficient as a matter of law upon which to order the seizure of these items temporarily as evidence, especially since petitioner was given the right to an immediate adversary hearing on the issue of the obscenity of any items ordered seized.

While petitioner's first and second points addressed the underlying validity of the entire search, petitioner's third point must be analyzed in relation to each of the three separate charges upon which petitioner was convicted by his plea of guilty. If the Court agrees with petitioner's contention that the search is illegal for the reasons set forth in his first or second point, then the entire seizure must be suppressed, *Mapp v. Ohio,* 367 U. S. 643 (1961). However, since petitioner was convicted of three (3) separate offenses, based upon three (3) different types of initial examinations of the items comprising the three (3) separate offenses, it is possible for the Court to logically determine that the Judge's initial examination of probable cause of obscenity as to the items comprising one or more charges was sufficient, while his initial examination as to other items may not have been. For this reason respondent will analyze the initial examination of the items comprising each offense separately, rather than lumping all the items together as petitioner has done.

This aspect of this case presents a novel issue. Two competing interests are in conflict. On one hand, there is the concept of "constitutional protection for free expression," *Marcus v. Search Warrant, supra,* 730. On the other hand, there is the accepted "postulate that the primary requirements of decency may be enforced against

obscene publications," *Kingsley Books v. Brown,* 354 U. S. 436, 440 (1957). The difficulty in resolving this problem is that a balance must be struck between these two competing, recognized interests.

Certain principles have been developed which can help resolve the issue. The standard to be applied in making a final adjudication of obscenity to convict criminally, or to enjoin permanently was announced by this Court in *Miller v. California,* 413 U. S. 15 (1973) and is quoted by petitioner in his brief. Second, this Court held that a Judge, not a police officer may make the initial determination of probable cause to seize an item temporarily, as evidence, *ex parte,* and the Judge may not make this initial determination based upon conclusionary allegations of police officers,[5] *Heller v. New York, supra; Marcus v. Search Warrant, supra; Lee Art Theater, Inc., v. Virginia, supra; Roaden v. Kentucky, supra.* Third, in *Kingsley Books v. Brown, supra,* this Court held that a state may temporarily enjoin a person from distributing expressive material if the person is granted the right to a prompt, full adversary hearing on the issue of whether or not the item is legally obscene.

[5]Left open is the question whether or not a Judge may make the initial determination of probable cause to seize based upon sufficient factual allegations of the police officer without ever seeing any of the items himself. At least one lower court has answered the question in the affirmative, *United States v. Pryba,* 502 F 2d 391 (C.A.D.C., 1974).

Thus, in order to strike a balance between a citizen's right to free expression and the public's right to enforce its requirements of decency against obscene items, a judge must "focus searchingly" on the issue whether there is probable cause to believe an item is obscene prior to any seizure of the item as evidence, *Heller v. New York, supra.* The term probable cause means "less evidence than would justify condemnation," *United States v. Ventresca,* 380 U. S. 102, 107 (1965). A Judge's "determination of probable cause should be paid great deference by reviewing courts," *Spinelli v. United States,* 393 U. S. 410, 419 (1969), *Jones v. United States,* 362 U. S. 257, 270, 271 (1960).[6]

While the Judge must "focus searchingly" on the issue of obscenity in making this initial determination, the extent or length of the initial restraint until the party may

[6]Counsel for petitioner urges that Judge O'Connor's determination is not only unworthy of a deference, but also of any weight whatsoever, because he is a layman, and because he couldn't recite the definition of obscenity under *Miller v. California, supra,* and the New York Penal Law. Probably, very few lawyers in this country could recite the definition from memory. However, as petitioner concedes, Judge O'Connor had a copy of the law with him during the search. Also, defining the word "obscene" has been a problem, even for this Court. *Miller v. California, supra,* details that problem. As Mr. Justice Stewart once said in commenting upon a definition of obscenity—

> I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alyberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it (footnotes omitted). *Jacobellis v. Ohio,* 378 U. S. 184, 197 (1964).

It is respectfully submitted that a layman, also could know it when he sees it.

fully litigate the issue of obscenity, also appears to be a factor to consider in assessing how much of the item the Judge must initially examine, *Kingsley Books v. Brown, supra; United States v. Sherwin,* 539 F. 2d 1 (9th Cir. 1976).

For example, it is submitted that a different standard or "focusing searchingly" should be required if hundreds or thousands of people are going to be prevented from seeing a full length film by its seizure for two to three weeks, than if only one or two, or perhaps nobody, is going to be prevented from viewing or buying a magazine by its seizure for only one or two days.

Also, common sense tells us that different types of materials lend themselves to different types of review. *United States v. Tupler,* 564 F. 2d 1294, 1298 (9th Cir., 1977, Judge Sneed, concurring). It is much quicker to review a short eight (8) millimeter film without sound which only displays one sexual act after another, or a magazine which only has pictures that show one sexual act after another or prominently display the genital area, than to review a 200 page erotic novel or a full length sound motion picture, *United States v. Tupler, supra,* Judge Sneed, concurring.

Common sense tells us that a Judge may consider the market or location where the items is being sold. *United States v. Tupler, supra,* Judge Sneed, concurring. If a Judge is in an adult store which exclusively promotes sexually explicit materials, and the store has numerous short films, once he has looked at some of the films, he could tell quickly whether or not other films were of the same genre as the ones he just saw. In that same type of store, once he looked through some picture magazines, he could tell quickly whether or not other picture magazines were of the same genre as the one he just saw.

On the other hand, if the Judge was at a large book store such as Barnes and Noble, which has a wide and diverse stock of materials, by looking at some items he wouldn't necessarily know what other items in the store would be like.

In the case at bar, one charge of Obscenity in the Second Degree was based upon petitioner's showing of 26 movies in machines in his store. These movies were all short length eight (8) millimeter films. The Judge viewed between two to three minutes of each of the 23 films without sound displayed to the public in the front room and between two and five minutes of the four films some with sound being displayed to the public in the rear room. Respondent submits that it cannot be said as a matter of law that the Judge did not view enough of these films in order to form a sufficient basis to determine whether or not there was cause to probably believe the film was obscene, especially where petitioner had the right to a full adversary hearing on the issue of obscenity immediately, or as soon as practicable after the seizure, *United States v. Pryba, supra.*[7]

The second charge of Obscenity in the Second Degree concerns 400 magazines. After viewing the 27 films in machines, the Judge looked at magazines being displayed to the public. While the Judge spent less than a minute on any magazine, it must be emphasized that the only magazines ordered seized were those consisting predominantly of pictures with captions. Any magazine with any significant amount of written material was not seized because the Judge did not review the written material. Again, respondent submits that it cannot be said as a matter of law that the Judge did not view enough of

[7]Although given this right to an adversary hearing petitioner never exercised it, nor did he ever challenge the obscenity of any of the films.

each magazine to form a sufficient basis to determine whether or not there was cause to believe that a magazine was probably obscene, especially when petitioner had the right to fully contest this finding in an adversary context immediately, or as soon as practicable, after their seizure.

The third charge of Obscenity in the Second Degree concerned some 474 reels of eight (8) millimeter films being displayed to the public in the front counter area of the front room. Each reel of film had a picture on the box and some had a brief summary of the sexual activity depicted in the reel. When the Judge started to open the first box to look at the film, the clerk of the store told the Judge that it was not necessary to look inside because all the films were sex films and the picture on the box showed what the film was all about. Certainly the Judge, who had already seen parts of 26-27 obscene films in the store, was entitled to take the clerk at his word that the picture on the box fairly summarized the contents of the film. And the fact that these films were being promoted by the clerk entirely on the basis of their appeal to sexual interest would strengthen the Judge's conclusion that this material was obscene, and not protected by the First Amendment, *United States v. Ginzburg*, 383 U.S. 463 (1966); (*United States v. Bush*, F2d , 5th Cir. decided 10/30/78). Respondent submits that with these representations by the clerk, it can not be said as a matter of law that a Judge could not decide whether or not there was probable cause to believe the film was obscene by looking at the picture on the box.

While respondent criticizes the entire search on the grounds that the Judge did not "focus searchingly" on the issue of obscenity of a single item, because he did not view any item in its entirety; it must be emphasized that this was not a quick *ex parte* search. The Judge

spent approximately six (6) hours reviewing this material in the clerk's presence, even with the clerk's representations.

POINT III.

There was no massive seizure requiring a prior adversary hearing in the case at bar.

Petitioner's reliance in the case at bar on *Marcus v. Search Warrant, supra; A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971) to support its argument that there is an unconstitutional massive seizure of the items requiring a prior adversary hearing in order to protect the necessary sensitivity to freedom of expression is totally misplaced. As this Court stated in *Heller v. New York, supra:*

> Petitioner's reliance on the Court's decisions in *A Quantity of Books v. Kansas*, 378 US 205, 12 L Ed 2d 809, 84 S St 1723 (1964), and *Marcus v. Search Warrant*, 367 US 717, 6 L Ed 2d 1127, 81 S Ct 1708 (1961), is misplaced. Those cases concerned the seizure of large quantities of books for sole purpose of their destruction, and this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid "danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." *A Quantity of Books v. Kansas, supra*, at 213, 12 L Ed 2d 809. *Heller v. New York, supra*, 491.
>
> In *United States v. Thirty-seven Photographs*, 402 US 363, 28 L Ed 2d 822, 91 S Ct 1400 (1971),

and *Freedman v. Maryland,* 380 US 51, 13 L Ed 2d 649, 85 S Ct 734 (1965), we held that " 'because only a judicial determination in an adversary proceeding ensures the necessary sensitivity of freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final restraint*' ". 402 US, at 367, 28 L Ed 2d 822, quoting 380 US, at 58, 13 L Ed 2d 649 (emphasis added). Those cases involved, respectively, seizure of imported materials by federal customs agents and state administrative licensing of motion pictures, both civil procedures directed at absolute suppression of the materials themselves. Even in those cases, we did not require that the adversary proceeding must take place prior to *initial* seizure. Rather, it was held that a judicial determination must occur "promptly so that administrative delay does not in itself become a form of censorship." *United States v. Thirty-seven. Heller v. New York, supra,* 489.

The higher hurdle of reasonableness referred to by this Court in *Roaden v. Kentucky, supra,* decided the same days as *Heller v. New York, supra,* was that a neutral and detached magistrate, not a member of law enforcement must make this initial determination of probable cause to seize. In *Roaden* a sheriff arrested the defendant immediately after viewing the film by himself, and seized the full length film being exhibited to the public at a drive-in theater incident to that arrest.

> This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. (cites omitted) *Heller v. New York, supra,* 488.

In the case at bar, every item seized was initially screened by the Judge and only taken as evidence. The police only took what the Judge directed them to seize.

An evil of the massive seizures condemned in *Marcus v. Search Warrant, supra; A Quantity of Books v. Kansas, supra;* and *Thirty-seven Photographs v. United States, supra,* is that the seizure itself can have a chilling effect by becoming a form of prior restraint and censorship. Therefore, when the owner of the material is given a prompt, adversary hearing on the issue of obscenity, *vel non,* after the seizure, seizures involving numerous items (see *United States v. Thirty-seven Photographs, supra,* 373) or even every copy of an item, *Kingsley Books v. Brown,* 354 U.S. 436 (1957), have been constitutionally permitted.

In the case at bar, petitioner was afforded the opportunity to have an adversary hearing on the issue of the obscenity of any item immediately or as soon as practicable. Such promptness meets any constitutional limitations, *Heller v. New York, supra; Kingsley Books v. Brown, supra; Thirty-seven Photographs v. United States, supra.*

> Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of "promptness" those delays caused by the choice of the defendant. *Heller v. New York, supra,* 490.

Thus, the fact that petitioner chose not to avail himself of the right to promptly determine the issue of obscenity, or for that matter even to contest obscenity at all, is not to be held against the respondent. In the case at bar, petitioner decided to proceed by challenging the search

and seizure by notice of motion, rather than to immediately ask that items be returned on the grounds of First Amendment protection. Petitioner consented to the holding of the hearing on August 20, 1976, and to February 3, 1977, as to the date upon which to plead guilty. As a matter of fact, on at least one occasion the plea date was adjourned at petitioner's request. At all times the State of New York was ready to proceed as expeditiously as petitioner desired. What the Court said in *Heller v. New York, supra,* 490, applies to the case at bar:

> Petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired.

Petitioner claims that the following facts show that the state was attempting to suppress distribution of the items, not to seize them temporarily as evidence: One, that the movie machines were seized; two, that the police stood at the door and took names; and three, that a large number of items were seized; and four, that there were more than one copy of an item taken.

Petitioner cites, *Dexter v. Butler,* 559 F. 2d 1286 (5th Cir. 1977), *Ellwest Stereo Theater, Inc. v. Byrd,* 404 F. Supp. 33, 51 (S.D. Tex., 1975) and *Bongiovanni v. Hogan,* 309 F. Supp. 1364 (S.D. NY, 1970) in support of his position that the seizing of the movie machine shows that the State was trying to finally suppress the material comprising the count of Obscenity in the Second Degree charging him with promoting 26 obscene films in the machines. However, *Dexter v. Butler, supra,* and *Ellwest Stereo Theater v. Byrd, supra,* involve the situation in which the police repeatedly seized the machine with the

films, and never instituted criminal proceedings. In *Dexter,* the police seized the four (4) copies of film and four (4) projectors on four (4) different occasions over a two (2) week period. Furthermore, the state had not charged the owner of the films with any violation even after 339 days. In *Ellwest Stereo Theater,* the police seized three (3) films in three (3) machines on one (1) day and then two (2) films in two (2) machines on another day. The state never prosecuted *Ellwest Stereo Theater* based on the seizure. The courts held that the repeated seizure, without ever initiating charges amounted to bad faith and an attempt to censor the films. In *Bongiovanni* the police seized a full-length film and lenses, and still photos which the Judge viewed at a theater. Relying on *Bethview Amusement Corp. v. Cahn,* 416 F. 2d 410 (2d Cir., 1969), which has been overruled by *Heller v. New York, supra,* the Court ruled that the film and photos must be returned because there was no prior adversary hearing on the issue of obscenity. It also ruled that the lenses should be returned because the minimal evidentiary value of the lenses was outweighed by the restriction to freedom of expression.

Under New York law, the state must prove, in addition to the fact that the item is obscene, that the petitioner promoted it or processed it with intent to promote it, New York Penal Law Section 235.05, Subdivision 1. The term "promote" is defined in New York Penal Law Section 235.00 Subdivision 4. Respondent submits that the machines are direct evidence of promoting under the law. They prove how petitioner was exhibiting the item. Thus, the state could seize them as evidence of promotion.

Clearly the facts that there has not been another seizure since 1976, that the store was continuously open, that petitioner was immediately issued an appearance ticket to answer charges concerning the seizure, and

search warrant shown to the clerk prior to the search put him on notice of his right to an immediate adversary hearing, show that respondent did not seize these items in bad faith to harass petitioner or finally restrain distribution, but rather seized them as evidence and attempted to minimize any chilling effect that the seizure of this evidence would have. However, even if the machines were improperly taken; the remedy would be to return them; not to suppress the entire seizure, *Bongiovanni v. Hogan, supra; United States v. Sherwin, supra.*

Petitioner citing *Maguin v. Miller,* 432 F. Supp. 223 (D. Kan., 1977); and *P.A.B., Inc. v. Stack,* 440 F. Supp. 937 (S. D. Fla., 1977) argues that by stationing police on the doors to take names, respondent was attempting to restrain distribution of ideas by harassing customers. However, *Maguin* and *P.A.B., Inc.* are totally distinguishable from the case at bar. In *Maguin,* the police conducted seven (7) seizures at the Circle Theater and on each occasion took the names of all people in the theater at the time. On three (3) occasions patrons had to state their names aloud. In *P.A.B., Inc.* the police continuously, between 37 and 100 times, stopped people entering and exiting the store and checked identification, took auto license numbers and stationed police or police cars in front of the store. Clearly, the Court in those cases had reason to find that the police were in bad faith harassing people in order to try to close the store.

In the case at bar, on only one occasion, on June 25, 1976, the time of the search and seizure, was an officer at the door to take names of those who entered, because these people were potential witnesses at a suppression hearing. Since that search, the police have not bothered the store. Contrary to petitioner's claim, both the police and petitioner's clerk knew that it was the police's intention for the store to remain open to the public throughout

the day. This is indicated by the facts that the petitioner's clerk was permitted to move freely throughout the store and at one point asked the police not to let any potential patron view the films in the machines without paying when he voluntarily automated the machine for the Judge. If the clerk had reason to feel that the police were closing the store by their actions, he never would have made that statement.

The fact that numerous different items were taken doesn't show that the items were taken in an attempt to finally restrict expression, *United States v. Thirty-seven Photographs, supra.* Each item was taken at the direction of the Judge after he reviewed it. Not every item in the store was taken. The Judge didn't direct that every item he viewed be taken. Items which he didn't view were left. As a matter of fact, the store was open for business the very next day. Petitioner never showed any final restraint as to any item seized.

The fact that under the first and second counts of the information more than one copy of some of the items were seized also doesn't show any intent, per se, to finally retain expression, *Kingsley Books v. Brown, supra; Art Theater Guild, Inc., v. Parrish,* 503 F. 2d 133 (6th Cir., 1974); *State v. Taylor,* 143 N. J. Super. 119 (Sup. Ct., App. Div., 1976). Under New York law the people must prove "promoting" the item in addition to its obscenity. The fact that a party has more than one copy of the item is clearly relevant on this issue. In fact New York Penal Law Section 235.10, Subdivision 2, creates a presumption that one intends to promote an article by processing six (6) or more identical or similar copies of the obscene articles.

The taking of more than one (1) copy of an item for a valid evidentiary purpose is permitted, *Art Theater Guild, Inc. v. Parrish, supra; State v. Taylor, supra.* As long as petitioner is given a prompt adversay hearing on this issue of obscenity, *vel non,* it makes no difference if one (1), two (2), ten (10) or more copies of the item are taken, *Kingsley Books v. Brown, supra.* However, even if taking more than one copy was improper, then proper remedy is to return the extra copies; not vitiate the counts tainted with duplicitous copies, *United States v. Sherwin, supra.*

If the intent was to finally restrain expression, why would the State have offered an immediate adversary hearing to contest obscenity and an opportunity to immediately reacquire the item? The mere posing of this question shows that everything seized in the case at bar was seized temporarily as evidence.

The language and holding of *Heller v. New York, supra,* is very appropriate:

> In the case, of course, the film was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with distruction. *Heller v. New York, supra,* 490.
>
> But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented containing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue

> in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. *Heller v. New York, supra,* 492.
>
> With such safeguards, we do not perceive that an adversary hearing *prior* to a seizure by lawful warrant would materially increase First Amendment protection. Cf. *Carroll v. Princess Anne, supra,* at 183-184, 21 L Ed 2d 325. The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation. The procedure used by New York in this case provides such First Amendment safeguards, while also serving the public interests in full and fair prosecution for obscenity offenses. Counsel for New York has argued that movie films tend to "disappear" if adversary hearings are afforded prior to seizure. We take judicial notice that such films may be compact, readily transported for exhibition in other jurisdictions, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film. *Heller v. New York, supra,* 493.

Conclusion.

In the case at bar, there was no search or viewing of any item for which petitioner had a legitimate expectation of privacy under the Fourth Amendment. Every item viewed was being displayed to the general public in areas open to the public, and was viewed by the Judge during business hours when the store was open to the public. Under our Constitution, any Judge or police officer may initially view items displayed to the public in public areas without a warrant or probable cause or with a general warrant.

In the case at bar, every item seized was initially viewed by the Judge prior to its seizure, and the item (and its copies) was only seized after the Judge was satisfied that there was probable cause to believe the item was obsecene. Throughout the day the Judge acted in a neutral and detached manner. He decided for himself what he would view and what should, or should not, be seized. While the Judge may not have viewed any item in its entirety, it cannot be said as a matter of law, that his initial review was insufficient. Especially since petitioner had the right to an immediate adversary hearing on the issue of obscenity, *vel non*. Given the fact that the items seized were short eight (8) millimeter films and predominantly picture magazines being offered for sale in a store claiming to promote sexually explicit material, the Judges review, taking six (6) hours was sufficient.

Throughout the day the State acted in good faith. Before starting the search the State obtained a warrant and showed it to petitioner thereby putting him on notice of his right to an immediate adversary hearing. The police sent enough men into the store so that they could minimize the amount of time it would take to gather the numerous items for the Judge to review and to transport the items the Judge directed to be seized. The police took names of people entering the store only to have a list of potential witnesses at a hearing. Since June 25, 1976, the police have made no attempt to interfere with petitioner's business.

Every item was seized as evidence to show that either the item iself was obscene or that petitioner was promoting it, or both. Every item was seized temporarily and petitioner had the right to an immediate adversary hearing to contest that the item was not obscene and therefore, have it returned.

THEREFORE, under the Constitution of the United States and the cases decided therein, each of petitioner's three separate judgments of conviction should be upheld.

Respectfully submitted,

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February, 1979.

Appendix.

NEW YORK STATE PENAL LAW §235.10 (2)

§235.10 (2) Obscenity; presumptions

A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

FEDERAL RULES OF CRIMINAL PROCEDURE Rule 41 (c) (2)

Rule 41 (c) (2)
Warrant upon oral testimony—

(A) General Rule—If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application—The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance—If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony—When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents—The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution—The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded—Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

Supreme Court, U. S.
FILED
APR 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

NEW YORK'S ARGUMENT, ADVANCED FOR THE FIRST TIME IN ITS BRIEF ON THE MERITS IN THIS COURT, THAT THE SIX-HOUR SEARCH OF PETITIONER'S STORE BY ELEVEN STATE OFFICIALS UNDER A CLAIM OF GOVERNMENTAL AUTHORITY WAS NOT SUBJECT TO THE FOURTH AMENDMENT, IS COMPLETELY WITHOUT MERIT.

When the eleven state officials invaded the petitioner's store, placed the only employee on the scene under arrest, and proceeded to conduct a six-hour general search of the entire premises, they claimed that their intrusion was authorized and justified by a search warrant which had previ-

ously been issued by Town Justice O'Connor. When the petitioner, in the trial court, moved to suppress the evidence carted away by the eleven state officials, the respondent adhered to this position and argued that the search and seizure had been justified by a validly issued and appropriately executed search warrant. Even in this Court, in its brief in opposition to the petition for certiorari, New York continued to argue that the conduct of its police officers, prosecutors and town justice complied with the Fourth Amendment because the search warrant under color of which it had occurred had been constitutionally proper.

Now, however, in its brief on the merits, the respondent, apparently recognizing the difficulty of its task, offers an altogether different justification for the search and seizure. In its brief on the merits, the respondent does not attempt to defend the search warrant in reliance upon which the state officials acted; the respondent does not argue that there was probable cause for the issuance of the warrant; the respondent does not argue that the warrant satisfied the particularity requirement of the Fourth Amendment. Rather, the respondent now argues that petitioner, as a retail store open to the public, is not entitled to the protection of the Fourth Amendment at all, because it has no reasonable expectation of privacy. As a consequence, respondent argues, it makes no difference whether the warrant was constitutionally proper or not, because the eleven state officials did not need it in order lawfully to search the petitioner's premises.[1] Thus, like the attempt by the respondent's officials to repair the defective general warrant in this case by appending fourteen pages to it after the seizure had already occurred, the respondent now, in an effort to carry the day, seeks to escape the infirmity of

[1] Br. of Resp., pp. 9-18.

the warrant by an after-the-fact claim that it was unnecessary in the first place. However, for the reasons set forth below in subsection A of this argument, this Court should not even consider this claim. Moreover, even if the Court were to consider the merits of the respondent's theoretical claim, the Court should reject the claim as completely without merit, for the reasons advanced below in subsection B of this argument.

A. *A Search Conducted in Reliance Upon a Warrant Cannot Later Be Justified on the Ground That No Warrant Was Necessary.*

The respondent argues hypothetically that because petitioner is a retail store open to the public, the eleven state officials in this case could lawfully have entered the store and viewed the petitioner's merchandise without probable cause and without a warrant, as members of the general public. Had they done so, the respondent asserts, they would have invaded no interest of the petitioner protected by the Fourth Amendment. This Court need not and should not consider this theoretical claim, however, because having relied upon the power and authority of a warrant to invade the petitioner's store and to search it from top to bottom for a six-hour period, the prosecution is in no position now to claim the petitioner's "open" door as authority and justification for the search.

In *Bumper v. North Carolina,* 391 U.S. 543 (1968), police officers appeared at the home the petitioner shared with his grandmother. Petitioner's grandmother met the officers at the front door. When the police announced that they had a search warrant to search the house, petitioner's grandmother told them to go ahead and search. A rifle seized by the police during this search was introduced, over objection, at the petitioner's trial for rape. At the hearing

on the petitioner's motion to suppress, the state disclaimed reliance on the warrant to justify the seizure and argued that the search was authorized by the consent of the petitioner's grandmother. The same argument was made in this Court. This Court rejected that argument, however, holding that:

> "'A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.' *Id.* at 391 U.S. 549 (footnote omitted).[2]

This same principle should operate to prevent New York in the present case from urging that the search conducted by eleven state officials in reliance upon a warrant can now be justified on the basis of the constructive consent the petitioner allegedly manifested to an inspection of its premises, by virtue of the fact that the petitioner, as a retail store, invited the public to enter its premises to transact business. New York, having taken the serious step of invoking its governmental power of search to achieve its law enforcement objectives, may not, in order to escape the Fourth Amendment consequences of having exercised that power, claim, on the basis of an after-the-fact hypothesis, that it could have accomplished the same objectives without invoking its power of search, by an alternative method which would not have invaded any interest of the petitioner protected by the Fourth Amendment.

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[2] *See also United States v. Cunningham,* 424 F. 2d 942 (D.C. Cir. 1970), *cert. denied,* 399 U.S. 914 (1970) and *United States v. Branch,* 545 F. 2d 177, 186, n. 24 (D.C. Cir. 1976) (a search claimed to be incident to arrest may not be justified, when it turns out that there was a lack of probable cause to arrest, on the basis of a hypothetical claim that, instead of arresting the suspect, the police officer could lawfully have stopped and frisked him and, thereby, have uncovered the same evidence in a manner which did not violate the Fourth Amendment.

There can be no question but that the eleven state officials who invaded petitioner's premises relied upon the power and authority of a search warrant, not upon whatever rights they may have had as members of the general public, to occupy the petitioner's store and search it thoroughly for a six-hour period. They claimed and relied upon governmental power and compulsory process to accomplish their preconceived plan, not upon the petitioner's implied consent to the admission of patrons who may have desired to purchase merchandise. As this Court noted in *Lewis v. United States,* 385 U.S. 206, 211 (1966), a case upon which the respondent relies:

> "A government agent, *in the same manner as a private person,* may accept an invitation to do business and may enter upon the premises *for the very purposes contemplated by the occupant. Of course, this does not mean that whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation* to [*Gouled v. United States,* 255 U.S. 298 (1921)], *is sufficient to dispose of that contention.*" (Emphasis added).

Whatever invitation the petitioner may have extended to the general public to enter its store, it did not include an invitation to seize exclusive control of the premises or to harass other customers or to view films without paying admission or to search for business documents or to tear off the covers of hundreds of publications or to arrest the only employee on the premises. Nor did the petitioner ever give up its right to exclude or remove from its store any patron who would engage in such conduct or otherwise abuse the limited privilege extended to him by the petitioner to enter the store.

By arguing that the search in this case should be upheld without regard to the validity of the warrant in reliance upon which it occurred, the respondent is asking this Court not only to disregard completely the facts of this case, but to assume and speculate that the eleven state officials could have acted in the same manner without the power of a warrant or a show of governmental force. *Compare United States v. Cunningham,* 424 F.2d 942 (D.C. Cir. 1970), *cert, denied* 399 U.S. 914 (1970); *United States v. Branch,* 545 F.2d 177, 186, n. 24 (D.C. Cir. 1976). In fact, however, absent the compulsory process of a search and arrest warrant and absent a claim of governmental authority, it is clear that the petitioner would never have allowed the state officials or anyone else, claiming the rights of the general public, to engage in any of the conduct which took place during the six-hour siege of petitioner's store.

Accordingly, this Court should not even consider New York's claim that the conduct of its officials in reliance upon a warrant was not subject to the Fourth Amendment. Having invoked the governmental power of search to accomplish its objectives, the respondent cannot avoid the Fourth Amendment consequences of the exercise of that power. *See Bumper v. North Carolina, supra.*

B. *The Conduct of the State Officials Under a Claim of Governmental Authority in the Form of a Search Warrant Was Subject to the Fourth Amendment.*

Even if this Court should reach the merits of respondent's claim, that claim should be rejected as completely without merit. The basic thrust of the respondent's argument is that a retail store open to the public has no reasonable expectation of privacy as to any area of the store to which the public is admitted.[3] Consequently, the respondent argues, the state officials in this case did not need a valid warrant or probable cause to enter the petitioner's store and view the merchandise offered for sale or exhibition by the petitioner. Rather, they could have claimed the right to enter the store and view the merchandise as members of the general public, unhampered by the restrictions of the Fourth Amendment until such time as they actually effected a seizure. Whatever the validity might be of such an argument in a case where a state official appears on the premises of a retail business open to the public, claiming no greater right to be there than that of any other customer, *compare Heller v. New York,* 413 U.S. 483 (1973), the argument simply has no relevance to the present case, because that is not what happened here.

[3] Br. of Resp., p. 12.

In the present case, the eleven state officials who invaded petitioner's store did so, from the very beginning, and at every step of the way, under a claim of governmental authority in the form of a search warrant and an arrest warrant. Upon entering the store, they immediately placed the only employee on the premises under arrest and informed him that they had with them a search warrant authorizing a search of the entire store. They placed uniformed guards both inside and outside the store and deterred any members of the public from entering by compelling them to display identification. In short, as soon as they entered under a claim of official right, the eleven state officials closed the store and, within the meaning of the Fourth Amendment, seized it and its entire contents for the duration of their six-hour search. *Compare Delaware v. Prouse,* —— U.S. ——, 24 Crim. L. Rep. 3079, 3081 (1979).[4]

[4] The expectation of privacy reasonably held by the petitioner at this point was that of a store closed to the public rather than that of a store open to the public. *Compare Recznik v. City of Lorain,* 393 U.S. 166 (1968).

Moreover, the six-hour search that followed the initial seizure of the store and which took place under compulsion of a search warrant was a governmental search in the truest sense of the word and bore no resemblance to the kind of inspection that could have been made by a prospective customer. The record in this case demonstrates that the state officials, claiming the authority of a search warrant, roved from one section of the store to another, viewing segments of films without paying the admission price; leafing through magazines and books with a view toward seizing them, not buying them; ripping off the plastic covers that completely enclosed hundreds of publications and stacking the publications in piles on the floor, a search and seizure under any definition of those words;[5] ransacking a multitude of films and other items behind a glass case in the counter area; and rifling through a box of business documents. At all times throughout the six-hour search, the only employee in the store was under arrest and the store was under the exclusive and complete control of the state.

The respondent argues that none of this conduct, however, was subject to the commands of the Fourth Amendment. Stated simply, the respondent argues that by engaging in a retail business open to the public, the petitioner abandoned its Fourth Amendment right to be free from the kind of police action which occurred in this case. Indeed, by a restrictive reading of *Katz v. United States,* 389 U.S. 347 (1967), a case universally regarded as having expanded the scope of protection afforded by the Fourth Amendment,[6] the respondent would declare an open season on all commercial enterprises which do business with the public.

[5] *See United States v. Chadwick,* 433 U.S. 1 (1977).

[6] *See Alderman v. United States,* 395 U.S. 165, 176-180 (1969); Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 385 (1974).

In *Katz,* this Court rejected the notion that the Fourth Amendment protects only against governmental intrusions accomplished by means of a trespass or physical intrusion into an enclosure. This Court held that the Fourth Amendment protects people, not areas, from governmental invasions of reasonably held expectations of privacy. The Court was quick to note, however, that the Fourth Amendment "... cannot be translated into a general constitutional 'right to privacy' ..." and that "... its protections go further, and often have nothing to do with privacy at all. ..." *Id.,* at 389 U.S. 350.

The respondent reads *Katz,* and subsequent decisions of this Court recognizing that the Fourth Amendment protects reasonable expectations of privacy,[7] as a restriction, rather than an expansion, of the scope of protection afforded by the Fourth Amendment. In particular, the respondent urges that the Fourth Amendment protects *only* privacy interests, which respondent narrowly defines as an interest in secrecy.[8] Under this view, a retail business which opens its doors to the public abandons any reasonable expectation of privacy (i.e., secrecy) it may have had in its premises and sheds its Fourth Amendment right to be free from unwarranted government invasion of its premises and interference with its business, regardless of the nature and scope of the intrusion. This view is completely without merit.

Whatever it is labelled, the petitioner here had a reasonable expectation, protected by the Fourth Amendment, that its commercial establishment would be secure from an unwarranted intrusion by government officials claiming

[7] *See United States v. Chadwick,* 433 U.S. 1 (1977); *Rakas v. Illinois,* —— U.S. ——, 99 S.Ct. 421 (1978).

[8] Br. of Resp., pp. 10, 12.

official power to assume dominion and control over the store. Whether or not the petitioner, by opening its doors to the public, assumed the risk that one or more of its paying customers would actually be a state official,[9] the petitioner by no means surrendered its reasonable expectation that it would be free from arbitrary invasion by government officials, not claiming the right of a customer, but claiming the superior right of official authority to search the store.

What the eleven state officials accomplished during their six-hour siege of petitioner's store, under authority of a search warrant, could never lawfully have been accomplished by a member of the public who accepted the petitioner's invitation to enter the store and purchase merchandise offered for sale or exhibition. No private citizen lawfully could have entered the premises in a show of force. No private citizen lawfully could have placed the only employee there under custody, and then proceed to insist upon the right to take the names of other customers, to see films without paying for them, to examine private business records, to rip off the covers of hundreds of publications and to occupy the premises for a six-hour period. *See State v. LaDuca,* 80 N.J. Super. 159, 214 A. 2d 423 (N.J. Super. Ct., Appell. Div. 1965). Indeed, had a private citizen attempted to do what the state officials in the present case did, petitioner justifiably could have called upon those very same state officials to come to petitioner's store and protect its property by enforcing the law against the private citizen.

Clearly, the petitioner had a reasonable expectation that the security of its premises would not be invaded in the

[9] *See Lewis v. United States,* 385 U.S. 206 (1966); *Hoffa v. United States,* 385 U.S. 293 (1966); *Lopez v. United States,* 373 U.S 427 (1963).

manner that it was. And it is precisely that kind of interest which the Fourth Amendment protects. Accordingly, the respondent's contention that the six-hour search of the petitioner's store was not subject to, and need not be measured by, the commands of the Fourth Amendment, is patently frivolous.[10]

[10] Even the respondent concedes that the seizure of over 920 items from petitioner's store was subject to the Fourth Amendment. What is unclear, however, is how the respondent claims the seizure was lawful. The respondent alludes to, but does not rely upon, the plain view doctrine. Nor could the respondent rely upon that doctrine, since the state officials were not lawfully in the place from which they gained their view of the materials seized; since, far from discovering these materials inadvertently, the officials invaded petitioner's store for the very purpose of searching for and seizing the materials they knew they would find; and since the alleged incriminating nature of the materials was certainly not immediately apparent. *See Coolidge v. New Hampshire,* 403 U.S. 443 (1971). Furthermore, the plain view exception to the warrant requirement has no application to the seizure of expressive material. *United States v. Sherwin,* 572 F. 2d 196 (9th Cir. 1977), *cert. denied,* —— U.S. ——, 98 S.Ct. 3101 (1978). The respondent appears to rely upon the magistrate's presence at the store and supervision of the seizure as a basis for upholding the seizure. As petitioner demonstrated in its opening brief, at pp. 32-35, however, the seizure cannot be justified on that basis.

II.

THE JUDGE'S EXAMINATION AT PETITIONER'S STORE OF SMALL PORTIONS OF EACH OF HUNDREDS OF FILMS AND PUBLICATIONS WAS AN INSUFFICIENT BASIS UPON WHICH TO ORDER THEIR SEIZURE.

The respondent does not take issue with the petitioner's account of Judge O'Connor's "examination" of the films and publications at petitioner's store. More specifically, the respondent concedes that the judge ordered the seizure from petitioner's store of every copy of numerous films on the basis of his having viewed isolated and minute segments of them; every copy of hundreds of publications on the basis of a two to ten second glimpse of "two or three pages, half a dozen pages" [11] of each; and every copy of numerous other films based solely upon a glance at the small still photograph on each of the boxes in which the films were contained.[12] In no instance did the judge inspect any film or publication in its entirety. The respondent, nevertheless, argues that the judge fulfilled his obligation to focus searchingly on the question of obscenity before removing these materials from the marketplace, despite this Court's clear pronouncement that a finding of obscenity can only be based upon a consideration of a work as a whole. *Miller v. California,* 413 U.S. 15 (1973).

The respondent argues that the focusing search on obscenity which this Court has prescribed as the constitutional prerequisite to a lawful seizure of expressive material does not mean that a magistrate, before ordering the seizure of a book or film, must necessarily review the entire item in question or even a substantial portion of it.

[11] Tr. 98.

[12] *See* Br. of Resp., pp. 23-24.

Rather, a quick and casual glimpse at a small fragment of the work in question may, in a given case, satisfy the constitutional requirements established by this Court.

The respondent argues that the extent to which a magistrate must focus searchingly on the question of the obscenity of a work before ordering it seized depends, in part, upon the nature and extent of the restraint that would be imposed by the contemplated seizure.[13] However, such an analysis would hardly help the respondent in this case, because here the seizure ordered by the judge was particularly repressive. In this case, the judge ordered the seizure of every copy of hundreds of films and publications, a type of seizure that this Court has characterized as imposing the most effective and final restraint possible. *Marcus v. Search Warrants,* 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964). The judge here completely and totally removed from the marketplace hundreds of films and publications and thereby accomplished a result which this Court has held lawfully can be accomplished *only* after an adversary hearing on the question of obscenity. *Marcus, supra; A Quantity of Books, supra.* Thus, if, as the respondent suggests, the extent to which a magistrate must focus searchingly on the question of obscenity depends upon the kind of restraint that would be imposed by the contemplated seizure, then the magistrate's burden to review the materials in this case in their entirety was greater, not lesser.

The respondent also argues that the kind of review constitutionally required of a magistrate depends upon the nature of the materials themselves and the location where the materials are being offered for sale. More specifically, the respondent argues that when the materials in question

[13] Br. of Resp., pp. 21-22.

are sexually oriented and are being offered for sale at an adult bookstore, a hasty examination of minute portions of each item is constitutionally adequate.[14] Exactly the opposite is true, however, for it is precisely with respect to sexually oriented materials that the line separating obscenity from constitutionally protected speech is most "dim and uncertain." [15] It is precisely when a magistrate reviews sexually oriented materials that he needs to employ "sensitive tools" [16] in the performance of his constitutional task.

Moreover, the variable and flexible *procedural* rule urged by New York would afford insufficient protection to materials *substantively* protected by the First Amendment. While this Court has recognized the power of the states to regulate obscenity, this Court has been ever watchful to require the states to adopt procedures for the exercise of that power which cannot readily be used to suppress non-obscene material. Thus, whenever this Court has been asked to approve a state procedure for the enforcement of obscenity laws, the Court has always applied the same test: whether the procedure in question includes sufficient safeguards to minimize the risk that its use would, or easily could, result in the suppression of non-obscene material. *Marcus, supra; A Quantity of Books, supra.* The procedure used by New York in this case falls far short of meeting that standard.

The approval of a procedure by which films and publications are seized on the basis of a rapid and fleeting review of small segments of each would jeopardize a vast bulk of materials entitled to First Amendment protection. Under such a procedure, a multitude of films and publications

[14] Br. of Resp., p. 22.

[15] *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963).

[16] *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

legitimately dealing with the important topic of sex would be subject to seizure. If this Court's repeated insistence upon procedures designed to focus searchingly on the question of obscenity prior to seizure of expressive material means anything, it must mean that a magistrate has to consider a work as a whole, either by reviewing it himself in its entirety or by studying an affidavit which fully sets forth the entire contents of the work, before ordering it removed from the marketplace. *See Marcus, supra; A Quantity of Books, supra; Heller v. New York,* 413 U.S. 483 (1973). Because the judge in the present case altogether failed to review adequately the materials he ordered seized from petitioner's store, the petitioner's conviction should be reversed.[17]

[17] New York points out that petitioner was convicted on three counts and urges that it might be appropriate for this Court to reverse less than all three counts by holding that Judge O'Connor's initial inspection of some of the materials was constitutionally adequate even if his inspection of other materials was not. The petitioner disagrees. First, the judge failed to focus searchingly on *any* item he ordered seized. Second, the massive seizure here cannot, by an after-the-fact review, be artificially multiplied into three distinct episodes. Rather, if any part of this enormous and indiscriminate seizure was unlawful, the entire seizure was necessarily tainted. *See Kremen v. United States,* 353 U.S. 346 (1957); *Von Cleef v. New Jersey,* 395 U.S. 814 (1969).

III.

THE MASSIVE SEIZURE OF PUBLICATIONS, FILMS AND PROJECTORS VIOLATED PETITIONER'S FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

This Court has recognized that the seizure of all copies of a publication or film represents the most effective and repressive final restraint upon the circulation of expressive materials possible. *Marcus v. Search Warrants,* 367 U.S. 713 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964). Since a final restraint lawfully can be imposed only following an adversary judicial proceeding on the issue of obscenity, *Freedman v. Maryland,* 380 U.S. 51 (1965), this Court has held that a seizure of all copies of a book or film may lawfully be effected only if it is *preceded* by an adversary hearing on the question of obscenity. *Marcus, supra; A Quantity of Books, supra.* Under this Court's decisions, it is clear, therefore, that the seizure of all copies of hundreds of publications and films in this case prior to any adversary hearing was unlawful.

The respondent argues, however, that the following language contained in the search warrant, under authority of which the repressive seizure in this case occurred, rendered the principles established by this Court's decisions inoperative:

> ". . . The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law."

The respondent argues that this language in the warrant gave its officials a license to engage in conduct during the raid of petitioner's store far in excess of that which could possibly have served any legitimate law enforcement purpose and entitled them to seize an enormous number of items not needed for any valid evidentiary purpose.[18] This argument is completely without merit.

In *A Quantity of Books, supra,* this Court was presented with an identical argument. In that case, it was argued that the massive seizure there should be upheld because the commercial establishment from which the books were seized was afforded a full hearing following the seizure, pursuant to a notice of hearing contained in the warrant. This Court rejected that argument, however, and held at 378 U.S. 212-213:

> "Nor is the order under review saved because after all 1715 copies were seized and removed from circulation, P-K News Service was afforded a full hearing on the question of the obscenity of the novels. *For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books.*" [Citations omitted] (Emphasis added).

Moreover, in *Heller v. New York,* 413 U.S. 483 (1973), this Court promised that any large scale seizure of expressive material would be scrutinized by courts ". . . to be certain that the requirements of *A Quantity of Books* and *Marcus* are fully met", *id.* at 413 U.S. 491, and to be certain that the purpose of a seizure is not to block distribution of materials presumptively protected by the First

[18] Br. of Resp., p. 27.

Amendment, but is merely to preserve as evidence the single copies of books or films needed for prosecution. The respondent claims that the purpose of the seizure in this case was not to block circulation of the hundreds of films and publications seized at petitioner's store but merely to preserve evidence needed for prosecution.[19] This claim is altogether belied by the record before this Court.

The respondent does not, and cannot, explain the evidentiary purpose served by the seizure of additional copies of the only two films specifically identified in the warrant and which the state already had in its possession before it even entered petitioner's store to execute the warrant. In fact, the only purpose served by the seizure of additional copies of those films was to block their exhibition.

The respondent defends the seizure of four coin boxes attached to the booths in which patrons could view films being exhibited by the petitioner as necessary to prove that petitioner "promoted" the films exhibited by it.[20] Although not expressly stated in its brief, presumably the respondent would defend the seizure of 26 film projectors on the same basis. The respondent's claim is utter nonsense, however. Proof of promotion derives from the fact that petitioner was a retail store open to the public and charged an admission price for viewing films and charged a purchase price for the sale of films and publications. Ten law enforcement officers and a magistrate were available to prove those facts beyond a shadow of a doubt by their testimony in open court. Clearly, the only purpose served by the seizure of the coin boxes, and particularly by the seizure of every one of the petitioner's film projectors, was to

[19] Br. of Resp., pp. 28-32.

[20] Br. of Resp., p. 29.

guarantee that the petitioner would be unable to exhibit *any* films to the public, regardless of their content.

The respondent defends the harassment of prospective customers by the police on the ground that "these people were potential witnesses at a suppression hearing." (Br. of Resp., p. 30). That contention is absurd. What relevant testimony could prospective customers possibly have given at the suppression hearing? The only purpose served by compelling prospective customers to display identification[21] was to harass them, to insure that the petitioner's store remained closed during the six-hour search, and to discourage the customers from returning at a later date. The complete invalidity of the respondent's contention that prospective customers were viewed as potential state witnesses at a suppression hearing is amply demonstrated by the fact that not a single one of them was ever called to testify when the suppression hearing in this case was held.

Finally, the respondent defends the seizure of all copies of hundreds of films and publications by pointing to a New York statute which establishes a presumption that one who possesses six or more identical or similar copies of an obscene article intends to promote such article.[22] In *Heller, supra,* this Court anticipated that such a claim might be made to justify a seizure of more than the one copy of a film or publication legitimately needed for evidentiary purposes. This Court made it clear that it would reject such a claim:

[21] This procedure clearly constituted a seizure of those citizens within the meaning of the Fourth Amendment. *Delaware v. Prouse,* —— U.S. ——, 24 Crim. L. Rep. 3079, 3081 (1979).

[22] Br. of Resp., p. 31.

> "... This is not to say that multiple copies of a single film may be seized as purely cumulative evidence, or that a State may circumvent *Marcus* or *A Quantity of Books* by incorporating, as an element of a criminal offense, the number of copies of the obscene materials involved." *Heller, supra,* at 413 U.S. 492, n. 8.

The mass seizure which occurred in the present case was clearly unlawful under the First, Fourth and Fourteenth Amendments. The respondent argues additionally, however, that even if that is the case, the proper remedy would have been the return to petitioner of all extra copies of the seized materials, not suppression of all fruits of the seizure. That being the case, the respondent argues, the petitioner's conviction may be affirmed notwithstanding the constitutional violation perpetrated by the mass seizure.[23] The petitioner disagrees for three reasons.

First, in *Marcus* and *A Quantity of Books,* this Court found it necessary to reverse the judgments, obtained after trial in those cases, ordering the destruction of materials found to be obscene, in order to vindicate the First and Fourteenth Amendment rights that had been abridged by the mass seizures that had occurred. Here, too, a violation of the First and Fourteenth Amendments infected the proceedings, necessitating a reversal of petitioner's conviction.

Second, for the reasons set forth in petitioner's opening brief at p. 44, the mass seizure here violated the Fourth Amendment as well as the First Amendment. Thus, the appropriate remedy is suppression of all items seized. *Mapp v. Ohio,* 367 U.S. 643 (1961).

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[23] Br. of Resp., p. 32.

Third, the constitutional values which are denigrated by an unlawful mass seizure cannot adequately be vindicated by anything less than a condemnation of the entire seizure and suppression from evidence of all of its fruits. In such a case, it is insufficient merely to order the return of the extra copies of the seized materials, while permitting the state to retain one copy of each seized film and publication for use as evidence at a criminal trial. If that were the only remedy afforded for an illegal mass seizure, law enforcement officers would have no incentive to limit seizure of expressive material to the single evidentiary copy needed for prosecution. They could seize multiple copies of allegedly obscene materials safe in the knowledge that they could block the distribution and circulation of films and publications offensive to them for a period of time without in any way jeopardizing any criminal prosecution which results.

Mass seizures of allegedly obscene materials are impermissible precisely because they impose prior restraints on the circulation of expressive materials, in violation of the First Amendment. If the only remedy for such a violation were the eventual lifting of the prior restraint, by return of the copies not needed for prosecution upon adjudication of an independent lawsuit or upon hearing of a motion to suppress, there would be no effective deterrent to the effectuation of mass seizures by law enforcement officers. Those who would use the search and seizure power to suppress the dissemination of unpopular ideas could do so successfully, without having to suffer any adverse consequences. Accordingly, only suppression of all evidence obtained in the course of an illegal mass seizure adequately vindicates the First, Fourth and Fourteenth Amendments. The petitioner's conviction should, therefore, be reversed.

CONCLUSION

For the reasons stated in its opening brief and upon the authorities and argument presented in this reply brief, petitioner respectfully urges the Court to reverse petitioner's conviction.

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC. AND THE FREEDOM TO READ FOUNDATION FOR LEAVE TO FILE A BRIEF, AS *AMICI CURIAE*, IN SUPPORT OF THE PETITIONER AND BRIEF ATTACHED

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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the National Association of College Stores, Inc., and The Freedom to Read Foundation (collectively referred to as *Amici*) hereby respectfully

move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached brief *amici curiae* in this case. The consent of the attorney for petitioner has been obtained and filed with the Court. The consent of the attorney for respondent was requested but refused.

The *Amici*

Amici's members publish, produce, distribute, sell and lend books, magazines and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State of New York. It is a major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

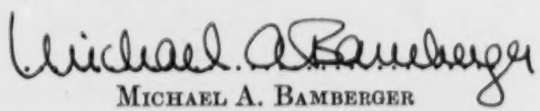
Interest of the *Amici*

The interest of *Amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on obscene ma-

terials not protected by the First Amendment. Although this case concerns admittedly obscene materials, the *Amici's* brief will indicate the impact of the legal principles involved upon those who publish, produce, distribute, sell and lend material which is not obscene. *Amici* have learned from experience that, at the local level, the sophistication required to make the classifications and distinctions necessitated by *Miller* v. *California*, 413 U.S. 15 (1973), is often absent, and that consequently legitimate constitutionally-protected books and periodicals are frequently treated identically with those materials which are obscene and not protected. Unless seizures justified by cursory examinations and massive seizures constituting prior restraints continue to be barred by this Court, a breach will have been created in the constitutionally mandated wall of the First Amendment.

In view of the foregoing, *Amici* seek leave to file the attached brief.

Respectfully submitted,



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Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,
Petitioner,

v.

STATE OF NEW YORK,
Respondent.

BRIEF ON BEHALF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AND THE FREEDOM TO READ FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the National Association of College Stores, Inc. and The Freedom to Read Foundation (collectively referred to as *Amici*) submit this joint brief, *amici curiae*, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the petitioner, Lo-Ji Sales, Inc., having submitted a motion for permission to file same.

Interest of the *Amici*

This case presents two questions which are of particular concern to *Amici*—whether the total seizure prior to an adversary hearing of over 860 copies of approximately 650 items, constituting all copies of the films, books and magazines determined by a magistrate *ex parte* to be possibly obscene, violates the First, Fourth and Fourteenth Amendments to the United States Constitution, and whether, in determining the question of whether there is probable cause to seize material from a book store on the ground of obscenity, the finder of fact must "focus searchingly" upon the alleged obscene materials taken as a whole, or whether a casual review of selected portions of the materials is sufficient.

Amici are concerned that the affirmance of the decision of the Court below, which represents a regression to the discredited standard of *Regina* v. *Hicklin*, [1868] L.R. 3 Q.B. 360, would be a radical departure from traditional First Amendment protections supported by this Court, and would represent a significant step backwards in the protection of legitimate First Amendment protected material by giving a magistrate the ability to order and effect the seizure of potentially protected First Amendment material without a searching focus on the material as a whole and further permitting massive seizures in violation of the prior learning of this Court, without the requisite prior adversary hearing.

POINT I

The seizure prior to an adversary hearing of over 860 copies of approximately 650 items, which constituted all the copies of such items held by petitioner, was constitutionally impermissible.

Whenever material to be seized falls "arguably within First Amendment protection, and the taking [brings] . . . to an abrupt halt an orderly and presumptively legitimate distribution or exhibition", *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973), the First Amendment to the U. S. Constitution "calls for a higher hurdle in the evaluation of reasonableness" of the search. Further, a massive seizure having an effect of a prior restraint is not permissible unless there has been a prior adversary hearing. *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 210 (1964).

Respondent concedes in the reply to the petition for certiorari that, whenever the Town Justice believed there was probable cause that an item was obscene, "each and every copy" of the item in the store was seized (Pet. in Opp. p. 5). (In all, over 860 copies of approximately 650 items were seized.)

What this Court stated in *Marcus* v. *Search Warrant*, 367 U.S. 717, 736 (1961), is equally apt here:

> ". . . there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing . . . , because all copies on which the police could lay their hands were physically removed . . . ."

Even if seizures are for the legitimate purpose of preserving the evidence (*Heller* v. *New York*, 413 U.S. 483, 490 [1973]), that legitimate purpose does not justify a

seizure of *all* copies of every item as to which probable cause may be deemed present. Such a seizure of substantially all petitioner's inventory is patently unconstitutional under the prior precedents of this Court.

There is another related constitutional defect present in this massive seizure. This Court has consistently held that an independent magistrate must "focus searchingly on the question of obscenity" before granting or denying a search warrant. *Marcus* v. *Search Warrant,* 367 U.S. 717, 732 (1961). In this case the Town Justice reviewed over 650 different books, periodicals and movies in approximately six hours. He devoted approximately 2-10 seconds to each book or periodical (looking at two, three or perhaps six pages), looked at a few minutes of each film that was on exhibition, and looked only at the picture on the outside of each box of film (Transcript pp. 97-99).[1] While we do not suggest this Court should impose a per item time limit or test, the cursory review implicit in a perusal of a few seconds cannot constitute the "searching focus" required by the decisions of this Court. Again, as was said in *Marcus* v. *Search Warrant, supra,* at 732:

> "It is plain that in many instances, if not in all, each officer actually made ad hoc decisions on the spot and, gauged by the number of publications seized and the time spent in executing the warrants, each decision was made with little opportunity for reflection and deliberation."

One of the dangers of massive seizures, where the massiveness relates to the number of titles seized, is that there is a significant possibility of First Amendment protected

[1] The implications of these facts on the requirement that the items be considered "as a whole" are discussed in Point II, *infra.*

material being included with that which is not protected. Human nature makes it more difficult to focus searchingly on 600 items than on six. This being the case, it is particularly important that in those instances in which large numbers of books or other printed works are included, the requirements imposed by this Court in prior decisions be scrupulously followed.

POINT II

A search warrant for allegedly obscene material should not be issued unless there is a sufficient factual basis of obscenity based on a review of the material as a whole.

The Town Justice reviewed over 650 books, periodicals and movies in approximately six hours. He found probable cause for books and periodicals to be obscene by devoting approximately 2-10 seconds to each book or periodical, looking only at two, three or perhaps six pages and looking only at the illustrations and captions (Transcript pp. 98, 99). He found probable cause for each motion picture to be obscene merely by viewing a photo from a single frame taken from the film, which photo appeared on the box containing the film, with respect to films in boxes, and by viewing a few minutes of each film that was on exhibition (Transcript pp. 97, 98). Based on these cursory and incomplete reviews, over 860 items (some duplicative) were seized.

Under *Miller* v. *California,* 413 U.S. 15, 24 (1973), the governing test for obscenity consists of three elements: (a) whether the average person applying contemporary community standards, would find that the work, *taken as a whole,* appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sex-

ual conduct specifically defined by the applicable law; and (c) whether the work, *taken as a whole,* lacks serious literary, artistic, political, or scientific value. The requirement of a "searching focus" for seizure warrants for books, periodicals and films means that the independent magistrate must have probable cause to believe that all three parts of the *Miller* test will be satisfied by the material to be seized. See *U.S.* v. *Tupler,* 564 F.2d 1294 (5th Cir. 1977). As was noted in *Tupler,* while it might be possible "in a rare case" that appeal to prurient interest could be established without considering the offending material taken as a whole, it is not possible to establish probable cause to believe that an item, "taken as a whole," lacks serious literary, artistic, political or scientific value unless the material is reviewed as a whole or at least substantially as a whole.

The requirement that material be considered as a whole is vital to drawing the line between First Amendment protected material and obscenity which is not so protected. The decision of this Court in *Roth* v. *United States,* 354 U.S. 476 (1957) laid to rest the standard of *Regina* v. *Hicklin* [1868] L.R. 3 W.B.360 that allowed material to be judged by the effect of isolated excerpts. Under that standard, works which are now considered great works of literature had been excluded. Since *Roth,* this Court has time and again held that in determining whether material is protected by the First Amendment, it cannot be judged merely by effect of an isolated excerpt but must be judged as a whole. In this case, the magistrate looked only at the illustrations and captions in the books and periodicals. This Court has consistently held, however, that pictures must be reviewed "in the context in which they appeared" as part of the whole work. *Kois* v. *Wisconsin,* 408 U.S. 229, 231 (1972).

This concept is important not only when applied to complete works such as films or novels, but also when applied to works that constitute compilations, whether they be newspapers, periodicals or anthologies. It should be noted that periodicals are involved in this case and that the Town Justice apparently merely flipped through the periodicals and books to make a decision. (Further, as noted in Point I, *supra,* the average time spent in reviewing each item of printed material was less than ten seconds.) This Court has held, however, in *Kois* v. *Wisconsin, supra,* that a portion of a compilative work (in that case, an underground newspaper) may be considered separately only if the non-obscene portions have been injected into the work for purposes of avoiding prosecution[2] or if the portion is in no way rationally related to the whole. In addition to *Kois* v. *Wisconsin,* this Court has applied the requirement that a work be judged as a whole to periodicals in *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, 489 (1962) and *Ginzburg* v. *United States,* 383 U.S. 463 (1966).[3]

As this Court has recognized in the past, the power to seize is simply a form of prior restraint. Therefore, it is necessary that the requirement of taking the work as a whole be applied as scrupulously in the finding of probable cause as in the ultimate determination of obscenity.

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[2] The example given by this Court was "a quotation from Voltaire in the flyleaf of [an otherwise obscene] . . . book." (408 U.S. at 231)

[3] The concept of compilations and anthologies goes far back in the history of thought and written expression. See 2 Encyclopedia Britannica at 29, "Anthology" (1962). Often such compilations or anthologies contain materials not previously published, as well as reprinting previously published material. See, *e.g., Dissertationes de studiis instituendis* published in Amsterdam in 1645 by Hugo Grotius and the printer Ludwig Elzevier.

CONCLUSION

In view of the foregoing, the *Amici* respectfully urge the Court to reverse the decision below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-511

LO-JI SALES, INC.,

Petitioner,

against

STATE OF NEW YORK

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT WITH BRIEF ANNEXED

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I

The New York Search Warrant Statute, As Construed and Applied Herein, Which Permits an Issuing Judge Who Is Conducting a Hearing on an Application for a Search Warrant to Hold Court and Receive Evidence at a Business Which Is Open to the Public, for the Purpose of Making a "Probable Cause" Determination as to the Obscenity of Certain of the Individual Items Possessed, Exhibited or Offered for Sale at Such Business, Prior to Their Seizure Under a Search Warrant, Does Not Violate the Fourth Amendment

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-511

LO-JI SALES, INC.,

Petitioner,

against

STATE OF NEW YORK

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the United States Supreme Court, for leave to file a brief as amicus curiae in support of the respondent, State of New York. The consent of the respondent

has been obtained and has been filed with this Court. The consent of Mr. Bernard A. Berkman, counsel for petitioner, Lo-Ji Sales, Inc., was requested by letter dated January 12, 1979, but no action has been taken on such request.

Moving party has a special interest in the subject of this appeal, both as the founder and co-counsel for Citizens for Decency through Law, Inc., (short title, "CDL"), and as a member of the Presidential Commission on Obscenity and Pornography. More recently, moving party was granted leave to appear as an amicus curiae in Saul Heller v. The People of the State of New York, October Term, 1972, No. 71-1043,[1] wherein this Court reviewed and upheld the judicial interpretation given to Article 690 of the New York Criminal Procedure Law (Search Warrants), and a seizure under the search warrant therein under attack.

Moving party submits that the definitive interpretations given in Heller, (see Heller v. New York, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651, (Dec. 1, 1971)), and in Lo-Ji Sales, Inc., that those procedures are authorized by the New York search warrant statute is completely non-reviewable by this Court. This Court must accept the state court's construction that the issuing Court

1. See Saul Heller v. New York, 409 U.S. 1021, 34 L.Ed.2d 313, 93 S.Ct. 458 (Nov. 20, 1972).

can take a view of the premises which are open to the public and can receive evidence on the items which are offered for sale to the public, and proceed to test its validity on that basis, under the traditional standard of "reasonableness." General Trust Co. v. Blodgett, 287 U.S. 590, 573; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688.[2]

In moving party's view, the Petition for Certiorari raises only one (not four) real jurisdictional question for this Court to answer; namely, the reasonableness of the provisions of the search warrant statute as construed by the New York Court of Appeals in Heller and in Lo-Ji Sales, Inc. The argument in support of the "reasonableness" of the New York procedures must keep in proper perspective the responsibility of the members of our State Court systems as Common Law judges to seriously consider the "public morals" values which the alleged unlawful public activities have placed in jeopardy, and the duty of judges to preserve the moral values which are common to our society. It is a

2/ This Court said in Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 3 L.Ed.2d 1512, 79 S.Ct. 1362 (June 29, 1959), involving New York's obscenity statute and the motion picture film "Lady Chatterley's Lover," at page 688: "(W)e accept the premise that the motion picture here in question can be so characterized. We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. . . ." (Our emphasis).

fundamental rule in our Anglo-Saxon legal system that the Courts are the guardian of the public morals. Rex v. Curl, 2 Strange 789 (1727); Sir Charles Sedley's Case, 1 SID 168.

The New York procedure which permits a "view" of the premises and the reception of autoptical evidence by the issuing judge at the site is an enlightened view. As the Chinese proverb has noted: "One picture is worth more than ten thousand words." Because the common law notion is that obscenity should be proscribed because it presents a moral public nuisance, Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S and R (Penn.) 91; 7 Am.Dec. 632, the "reasonableness" of any proposed seizures may invoke a consideration of a host of variables including a view of the premises and the circumstances surrounding the business itself. See Pinkus v. California, ___ U.S. ___, 56 L.Ed.2d 293, 302, 98 S.Ct. ___ (May 23, 1978):

> "Pandering is 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' Ginzburg v. United States, supra, at 467, 16 L.Ed.2d 31, 86 S.Ct. 942. We have held, and reaffirmed, that to aid a jury in its determination of whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. Splawn v. California, 431 U.S. 595, 598, 52 L.Ed.2d 606, 97 S.Ct. 1937 (1977); Hamling v. United States, supra, at 130, 41 L.Ed.2d 590, 94 S. Ct. 2887. In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation."

Compare the discussion on "nuisance" of Mr. Justice Stevens, speaking in another context in F.C.C. v. Pacifica Foundation, ___ U.S. ___, 57 L.Ed.2d 1073, 1904, 98 S.Ct. ___ (July 3, 1978):

> "The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a 'nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.' Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 71 L.Ed. 303, 47 S.Ct. 114, 4 Ohio.L.Abs. 816, 54 ALR 1016. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."

Moving party believes that the above arguments may not be fully discussed in the respondent's brief and, therefore, respectfully requests that he be granted leave to file a brief amicus curiae setting forth the same on the jurisdictional question posed herein, for such assistance as they may provide to the individual justices sitting herein.

DATED: February 26, 1979.

CHARLES H. KEATING, JR.
Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-511

LO-JI SALES, INC.,

Petitioner,

against

STATE OF NEW YORK

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

BRIEF AMICUS CURIAE OF CHARLES H. KEATING, JR., IN SUPPORT OF RESPONDENT.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law (unreported) of Town Justice Frank L. Giza of the Local Criminal Court, Town of Waywayanda, dated November 13, 1976, required by Criminal Procedure

Law section 710.60(4) after a hearing on a motion to suppress physical evidence seized under a search warrant, is set forth in the Petition for Certiorari at pages 1a - 4a.

The order of the Appellate Term of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts (unreported), held in Nassau County on April 25, 1978, affirming a judgment of the Local Criminal Court, Town of Waywayanda, County of Orange, rendered on February 3, 1977, convicting petitioner, Lo-Ji Sales, Inc., after a plea of guilty to a violation of section 235.05(1), New York Penal Laws (3 counts), is set forth in the Petition for Certiorari at pages 5a and 5b.

The certificate of the New York Court of Appeals (unreported), dated July 5, 1978, denying Lo-Ji Sales, Inc.'s application for leave to appeal on the ground that there is no question of law presented which ought to be reviewed by the Court of Appeals, is set forth in the Petition for Certiorari at pages 7a and 8a.

STATEMENT OF JURISDICTION

The 900 items of evidence which provided the basis for a criminal complaint charging petitioner with three counts of obscenity in the second

degree under New York Penal Law 235.05,[1] were seized under a search warrant issued on June 25, 1976. Petitioner's motion for suppression and return of such items was denied after a hearing held on August 27, 1976. Thereafter, upon a plea of guilty on February 3, 1977, petitioner was convicted on all three counts. The Appellate Term affirmed the conviction by order entered on April 25, 1978.[2] The petitioner's application for leave to appeal was denied by the New York Court of Appeals on July 5, 1978. The Petition for a Writ of Certiorari was filed on September 26, 1978, and was granted on November 27, 1978.

1/ The three counts of the complaint are set forth at page 3a of the Petition for Certiorari, and read:

"Count One: Possesses 400 books which depicts and describes in an offensive manner deviate sexual intercourse and deviate sexual acts.

Count Two: Possesses 474 movie reels which depicts and describes in an offensive manner deviate sexual intercourse, deviate sexual acts and beastiality.

Count Three: Possesses 26 Movie projectors, five with sound, which depicts and describes in an offensive manner deviate sexual intercourse and deviate sexual acts.

2/ Criminal Practice Law, section 710.70(2) provides:

"2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty."

The jurisdiction of this Court rests on 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the First, Fourth, and Fourteenth Amendments to the Federal Constitution are set forth in this brief at Appendix A-1.

The statutory procedures governing the issuance and execution of search warrants in the State of New York appear in Article 690 (sections 690.05 through 690.55) of the New York Criminal Procedure Law, and are set forth in this brief at Appendix B-1 through B-10.

The applicable statutory procedures governing Lo-Ji Sales, Inc.'s motion to suppress evidence taken under a search warrant, appear in New York Criminal Procedure Law sections 255.10-(1)(f), 255.20, 710.20, 710.50, 710.60, and 710.70, and are set forth in this brief at Appendix C-1 through C-4.

Sections 235.00 and 235.05 of the New York Penal Law are set forth in this brief at Appendix D-1 through D-3.

QUESTION PRESENTED FOR REVIEW

1. Do the statutory procedures governing the issuance and execution of search warrants established by the State Legislature in New York Criminal Procedure Law Article 690 (sections 690.05 through 690.55), as refined by the New York Judiciary in Heller v. New York,[1/] and as further explicated by the New York Judiciary in this cause,[2/] violate the fundamental principles which are expressed in the First, Fourth, and Fourteenth Amendments to the United States Constitution?

1/ In Heller v. New York, the New York Judiciary interpreted the statutory procedures to authorize an issuing judge to hold court and receive evidence at a public theater where a film is being exhibited to the public, for the purpose of making a "probable cause" determination as to the obscenity of a film prior to its seizure under a search warrant.

2/ By denying Lo-Ji Sales, Inc.'s application for leave to appeal herein, the New York Court of Appeal has, by implication, further explicated the statutory procedures to also authorize an issuing judge to hold court and receive evidence at a store where films, books, magazines, and other articles are being exhibited and offered for sale to the public, for the purpose of making a "probable cause" determination as to the obscenity of individual items in such store, prior to their seizure under a search warrant.

STATEMENT OF THE CASE

This case is before this Court on a Writ of Certiorari to review petitioner's conviction, after a plea of guilty to a violation of section 235.05(1) New York Penal Laws. The 900 items of evidence which are described in the criminal complaint, charging the petitioner with three counts of obscenity in the second degree, were seized under a search warrant issued and executed on June 25, 1976. Petitioner's motion for suppression and return of such items was denied after a hearing held on August 27, 1976. Thereafter, on February 3, 1977, petitioner pled guilty and was convicted on all counts. Under Criminal Practice Law, section 710.70(2), the order denying the petitioner's pre-trial motion to suppress evidence is reviewable upon appeal, notwithstanding the fact that the judgment of conviction is entered upon a plea of guilty. On appeal to the Appellate Term of the State of New York for the Ninth and Tenth Judicial Districts, the convictions were affirmed on April 25, 1978, and an application for leave to appeal to the New York Court of Appeals was denied on July 5, 1978.

Petitioner's claim that the 900 items of evidence seized under the search warrant should

have been suppressed on the pre-trial motion is grounded upon an attack on the validity of the New York search warrant statute, Article 690 (sections 690.05 through 690.55) of the New York Criminal Procedure Law,[3/] as construed and applied in Saul Heller v. New York, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (Dec. 1, 1971) and by the New York courts in this case below. Those judicial decisions have permitted the issuing judge who is conducting a hearing on an application for a search warrant, to hold Court and receive autoptical evidence (to supplement the required affidavit evidence) at an establishment which is open to the public for business, for the purpose of making a "probable cause" determination as to the obscenity of certain of the individual items possessed, exhibited, or offered for sale in such business, prior to their seizure under the search warrant.

Petitioner claims that the New York search warrant procedures, as construed and applied by the New York Courts below, violate the First, Fourth and Fourteenth Amendments of the United States Constitution. Amicus submits that the search warrant procedures, as applied to the

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3/ Article 690 (Search Warrants) is set forth in this amicus brief at Appendix B-1 through B-10).

facts in this case are reasonable, and do not violate the federal constitution.

STATEMENT OF FACTS

On June 20, 1976, Investigator Johannes Hurbanek of the New York state police entered petitioner's bookstore in the Town of Wawayanda, where he purchased two motion picture films entitled "Linda and Duke" and "Four for Dinner" offered for sale there (Tr. 4-5,44).[4/] Five days later, on the morning of June 25th, he went to the district attorney's office for Orange County in Goshen, New York, where he found Town of Wawayanda Justice John O'Connor (Tr. 5). Investigator Hurbanek requested the judge to view the two films which Hurbanek had purchased at petitioner's store, and the judge viewed the same that morning at the prosecutor's office (Tr. 6, 42). Investigator Hurbanek then prepared two affidavits; one for a search warrant, and one for a warrant for the arrest, on an obscenity charge, of Alex Mandakis, the clerk who had sold Hurbanek the films (Tr. 6-7). The affidavit in support of the search warrant detailed the purchase of the two films at petitioner's bookstore

4/ The abbreviation "Tr." refers to the Transcript of the hearing on the petitioner's motion to suppress evidence.

by Hurbanek and included an allegation that the affiant believed similar items (films and magazines) were being offered for sale at the petitioner's store and requested that the issuing Court take a view of the store and personally review the similar items which the affiant referred to.[5/] Investigator Hurbanek's affidavit read, in part, as follows:

> "3. In support of your deponent's assertion as to the existence of reasonable cause, the following facts are offered based upon personal knowledge as attested to by your deponent. On June 20, 1976, I personally was present in the aforedescribed premises (Adult Store) and purchased from Alexander Mandakis one reel of 8mm motion picture film approximately 200 feet in length called 'LINDA AND DUKE'. Upon viewing this reel of motion picture film, I observed it to contain acts of female masturbation and activities involving beastiality in that a female participant in the movie attempted to engage in acts of sexual intercourse with a German Shepard type dog. I also purchased a reel of super 8mm motion picture film approximately 200 feet in length entitled 'FOUR FOR DINNER'. Upon viewing this reel of film, I observed acts of sexual intercourse, sodomy, fellatio, cunnilingus, and masturbation. These reels of film are presently in my possession and are available for the viewing of the Court so that it may independently determine whether or not the

5/ Investigator Hurbanek's request is authorized by the last paragraph of Criminal Procedure Law section 690.35 and Heller v. New York, supra. See Appendix to this brief at page B-5.

acts portrayed come within the statutory prohibition under Article 235 of the Penal Law.

"4. While in the premises, I observed what I have reasonable cause to believe are the same or similar films. I also observed in the premises other reels of film, magazines and other objects. Based upon my observations, and my conversations with Mr. Mandakis which indicated to me that the films and magazines portrayed similar activities as described above, I have reason to believe that this material is being possessed in violation of Article 235 of the Penal Law of the State of New York.

"5. The foregoing represents the grounds for my belief.

"6. It is further respectfully requested that the Court accompany deponent at the time of the execution of the warrant applied for so that it can independently determine under the applicable legal principles whether or not any of the additional material present in the aforedescribed premises is in fact possessed in violation of the law and therefore subject to seizure."

The concluding paragraph made the following request.

WHEREFORE, your deponent requests that the Court issue a search warrant directing a search for and seizure of the following property:

1.) 200 foot reels of 8mm motion picture film entitled 'LINDA AND DUKE'.

2.) 200 foot reels of super 8mm motion picture film entitled 'FOUR FOR DINNER'.

3.) Any other material that the Court may independently determine upon viewing to be possessed in violation of Article 235 of the Penal Law.

Before the affidavits or warrants were signed, Hurbanek and the judge left the prosecutor's office and proceeded to the town of Wawayanda, where they met with a number of police officers at a traffic intersection (Tr. 9). There, at approximately 10:30 A.M., Hurbanek signed the affidavits and the judge signed the warrants (Tr. 9). At the time the judge signed the search warrant on the morning of June 25, 1976, it was a two-page document (Tr. 88) and read as follows:

LOCAL CRIMINAL COURT
TOWN OF WAWAYANDA
COUNTY OF ORANGE
STATE OF NEW YORK

HONORABLE JOHN O'CONNOR,
ISSUING JUDGE

TO ANY POLICE OFFICER OF THE NEW YORK STATE POLICE:

You are hereby authorized and directed to search the following premises: a single store brown wood frame building named "Adult Store," located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

You are hereby authorized and directed to search for and seize the following property, to wit:

1.) 200 foot reels of 8mm motion picture film entitled LINDA AND DUKE.

2.) 200 foot reels of super 8mm motion picture film entitled FOUR FOR DINNER.

3.) The following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law:

This warrant must be executed not more than 10 days after the issuance and any property seized pursuant hereto shall be returned and delivered to the Court without unnecessary delay.

The concluding paragraph of the search warrant gave special notice to any persons arrested or charged pursuant to its execution that they were entitled to an immediate adversary hearing, and read as follows:

"The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law.

DATED: Goshen, New York
June 25, 1976

Local Justice

At approximately 11:13 A.M., Judge O'Connor and Investigator Hurbanek entered the store. Investigator Hurbanek told Mr. Mandakis that he had a warrant for his arrest and that Judge O'Connor was there to conduct a search of the store. Investigator Hurbanek then advised Mr. Mandakis of his rights under the Fifth and Sixth Amendments to the United States Constitution.

Judge O'Connor viewed parts of 23 films being shown to the public in money operated machines in the front room of the store. After inquiring

of clerk Mandakis whether he had sufficient quarters to activate the film projectors in all 23 booths available for viewing of motion picture films, the clerk, instead, turned on a main switch which allowed the film projectors to be activated without inserting quarters (Tr. 13, 121). Judge O'Connor then went into each of 22 booths which were operable and viewed two to three minutes of each film (Tr. 97). When he was satisfied that there was reasonable cause to believe that the film was obscene under the Penal Law of the State of New York he orally directed the police to seize the film and the projector. Thereafter, 22 films and the film projectors used to exhibit the films in the booths (Tr. 15-17) and four of the coin boxes attached to the booths (Tr. 64, 68) were seized.

After completing the seizure in the booth area, Judge O'Connor proceeded to two rooms in the rear of petitioner's premises, where the judge viewed two to five minutes of each of four motion picture films being exhibited in those rooms (Tr. 16-17, 98). When he was satisfied that there was reasonable cause to believe that a film was obscene under the Penal Law, he ordered its seizure. Thereafter, all four films and the film projectors used for their exhibition were seized (Tr. 16-17).

While Judge O'Connor was reviewing the petitioner's films in the booth area and the two rear rooms, several of the police officers remained in the main room of the store where they placed books and magazines from display cases in piles, in anticipation of an examination of such materials by the Court (Tr. 18-19). Each stack of books represented a different title. If there were five copies of a particular publication in the petitioner's store, all five would be taken from the shelf and stacked in one pile (Tr. 18-19).

When Judge O'Connor completed his examination of the films in the rear of the store, he returned to the main room where the books and magazines were offered for sale in four major display areas (Tr. 20). Moving from one section to another, he employed the same procedure in each display area until each one of the four sections in the main room has been examined. The police were instructed to remove the sealed plastic which enclosed each of the magazines and many of the books in the store (Tr. 19). He then spent "maybe two maybe ten seconds" on each book or magazine, leafing through "two or three pages, half a dozen pages" of each publication (Tr. 98), looking through enough of each magazine so that he could determine whether there was reasonable cause to believe that the individual magazine was obscene

under the New York State Penal Law. Where the Judge was satisfied that there was reasonable cause to believe that the magazine was obscene, he directed the police to seize each and every copy of the magazine being displayed to the public. However, he did not order the police to seize every magazine that he viewed; and accordingly, those magazines that the Judge did not deem obscene were left in the store.

The Court then moved to the one remaining area of the store which had not yet been examined, the counter area where the cash register was located, and where films and other articles were located behind a glass case (Tr. 26-27). The Court instructed clerk Mandakis that it did not intend to view the films in the case, but merely intended to open the boxes in which each of the films was contained (Tr. 26). Mr. Mandakis, the person in charge of the store, told the Judge that it was not necessary to view the film inside the box because all the films were "sex films" and that the picture on the box showed what the film was all about. The Judge then viewed the pictures on the box. When he was satisfied from viewing the picture on the box that there was reasonable cause to believe that the film inside was obscene under the Penal Law, he directed the police to seize it. After viewing the 3 to 4

inch square still photograph on each of the boxes, the judge determined that in each case the 8mm 200 foot film inside the box was obscene (Tr. 36-38, 123-124). Thereafter, he ordered the police to confiscate every copy of each film located in the glass case (Tr. 26, 36-37).

The judge also ordered the seizure of certain articles of clothing displayed on mannequins in the store, including brassieres and panties (Tr. 103). He found the clothing to be obscene because it was displayed in such a way as to "arouse sexuality" and because the clothing was not, in his opinion, the type commonly "used" (Tr. 103). He ordered the clothing seized, as well as the ten mannequins on which the clothing was displayed (Tr. 103, 54-55; A. 39a). Other items seized included a ring toss game and a box containing business records (A. 45a).

During the six hour period in which the search was conducted, the store was open to the public but no sales were made. Mr. Mandakis moved freely throughout the store during the entire day. During that time two or three marked police cars were outside the store. The number of state officials who participated fluctuated between eleven and fourteen (Tr. 69-70), three of whom were uniformed policemen (Tr. 31). Potential customers coming into the store were required

to display some identification to the police. A total of 920 items were seized under the search warrant.[6/]

The Judge left the store at approximately 5:00 P.M. and at that time the police transported all of the items that the Judge directed to be seized to the New York State Police Headquarters, Middletown, New York. Thereafter, two typists from the district attorney's office appeared at the police barracks (Tr. 46) and additions were made to the warrant to include within its authorization all of the items appearing on the list compiled by Investigator Hurbanek during the course of the search (Tr. 96), which had been seized under the Court's oral order (Tr. 12). As the police announced the title or other description of each item that had been seized under the Courts oral order, one typist inserted it in the inventory and the other typist added it to paragraph three of the search warrant (Tr. 46), expanding the search warrant from the two page document that it had been at the time the judge signed it to a document consisting of

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6/ The 920 items are described in the Search and Seizure Receipt and Inventory, prepared pursuant to Criminal Procedure Law, section 690.50(4). A copy of section 690.50(4) is set forth in this brief at Appendix B-9. A copy of the "Receipt and Inventory" appears in this brief at Appendix F-1 through F-15.

sixteen pages (Tr. 34-35; 48-49).

At approximately 11:00 P.M. that evening, the completed warrant was shown to Judge O'Connor who had earlier signed the document (Tr. 85). He assumed that the additions to the warrant were taken from the list he had seen Investigator Hurbanek make in long-hand during the time the search warrant was executed (Tr. 96).

On June 26, 1976, the day after the search, the store was again opened for business.

On July 15, 1976, petitioner was charged with three counts of Obscenity in the Second Degree, in violation of the provisions of Section 235.05, Subdivision 1 of the Penal Law of the State of New York. The subject of the first count was approximately 400 magazines seized at the direction of Judge O'Connor during the course of the search from the tables and walls in the front part of the store. The subject of the second court was approximately 474 reels of film which were seized from the counter in the front of the store at the direction of Judge O'Connor during the course of the search. The subject of the third count was 26 rolls of film seized from the money operated machines in the front and rear of the store at the direction of Judge O'Connor during the course of the search.

By motion dated July 29, 1976, petitioner,

through his attorneys, moved to suppress the evidence seized from the store on June 26, 1976. With the consent of the petitioner's attorney and the People, a suppression hearing was scheduled and held on August 27, 1976, at 2:00 P.M. Prior to the hearing, petitioner asked Judge O'Connor to disqualify himself on the ground that petitioner intended to call the Judge as a witness. Accordingly, the Judge disqualified himself and Town of Wawayanda Justice Frank Giza conducted the hearing. Town Justice Giza submitted written findings of fact and conclusions of law dated November 13, 1976.[7/]

On February 3, 1977, petitioner, through his attorneys, pled guilty to all three counts of Obscenity in the Second Degree and was fined $1,000 on each count. Pending petitioner's appeal to the State Appellate Courts, the State of New York and the Local Justice agreed to stay imposition of the $3,000 fine.

In March of 1977, petitioner abandoned the store and a new corporate owner, Gorunga, Inc. took over possession of the store.

7/ Findings of Fact and Conclusions of Law are required by Criminal Procedure Law, section 710.60(4). (See Appendix C-3 to this brief.) A copy of the Findings of Fact and Conclusions of Law is set forth in this brief at Appendix E-1 through E-4 .

Petitioner appealed Judge Giza's decision to the Appellate Term, Ninth & Tenth Judicial Districts, Supreme Court, State of New York, and on April 25, 1978, the Appellate Term upheld the determination of Town Justice Giza. Thereafter, on July 5, 1978, the New York Court of Appeals denied petitioner's leave to review the Appellate Term's decision. After the New York Court of Appeals refused to review petitioner's appeal, petitioner refused to pay the fine of $3,000 which had been stayed.

SUMMARY OF ARGUMENT

The New York search warrant statute, as construed and applied herein, which permits an issuing judge who is conducting a hearing on an application for a search warrant to hold Court and receive evidence at a business which is open to the public, for the purpose of making a "probable cause" determination as to the obscenity of certain of the individual items possessed, exhibited or offered for sale at such business, prior to their seizure under a search warrant, does not violate the Fourth Amendment as an unreasonable search and seizure. Said statute is merely an extension of the procedure approved by this Court in Heller v. New York, 413 U.S. 483 (1973).

The construction of Article 690 (Search Warrants) of the Criminal Procedure Law, adopted by the New York Court of Appeals, is binding on this Court. The validity of said statute must be tested on that basis, under the traditional standard of "reasonableness."

The New York procedure which permits an issuing judge to hold Court and receive autoptical evidence at a business which is open to the public, prior to any seizure under the search warrant, is an enlightened view. The "reasonableness" of any

seizure depends upon a host of variables, including the circumstances surrounding the business itself, where a determination must be made that there is "probable cause that the subject matter is obscene." Here the New York Procedure enables the marshalling of evidence which accurately depicts the criminal nature of pandering of that business.

Having received notice through investigator Hurbanek's affidavit of the pandering nature of petitioner's business, the issuing judge had a moral responsibility to respond to the request that he take a view of the premises and examine the stock in trade for "probable cause" as to obscenity. The Courts are the guardians of the public morals. Obscenity is proscribed because it prevents a moral public nuisance, which is in the nature of a "nuisance per se." The common law power entrusts municipal corporations and their officers with not only the right but the obligation to remove said nuisances which are injurious to public health or morality.

The Fourth Amendment does not require that the state exhaust all other possible means of obtaining the materials in question before making application for a search warrant. To require law enforcement to obtain the necessary evidence through purchase of subject films and magazines

with public funds would place an unreasonable burden on the public treasury, especially where evidence of pandering and the quantity of different materials becomes as extensive as in this case. If no procedure is available for recouping the funds from the defendant, an absurd result is achieved, wherein the defendant profits and government suffers from the law enforcement efforts. A single massive purchase, followed by an immediate arrest and seizure of the money paid: (1) fails to solve the problem of how to marshal evidence where no "sale" is involved and the crime alleged is that of "exhibiting" an obscene film in a vending machine; and (2) is subject to attack under a Fourth Amendment claim that the purchase was a sham intended to accomplish an unlawful seizure without the need for a formal search warrant of materials which were presumptively protected by the First Amendment. Two other judicial procedures which have been utilized to obtain evidence in such cases (i.e. the subpoena duces tecum and the restraining order) have likewise proved to be wholly unsatisfactory. The choice between which method to use is to be made on a practical basis, by the prosecutor, and one of the primary consideration should be which method is most likely to secure the evidence and prevent its destruction.

The requirement for pre-seizure judicial scrutiny of allegedly obscene materials compelled the issuing judge to become more intimately involved than in ordinary search and seizure activities by police officials. This requirement places major mechanical burdens on the police and court systems. The technique employed by Judge O'Connor in this case is designed to satisfy both the constitutional requirement of pre-seizure judicial scrutiny and the exigencies of the circumstances.

The issuing judge's oral order of seizure, which was based upon probable cause, amounts to a constitutionally sufficient warrant, even though it was reduced to writing after the actual seizure and inventory. Adequate "safeguards" existed between the police and the defendants, the "higher hurdle" of judicial intervention was provided for, and the added protection of an immediate adversary hearing was present. A search warrant is nothing more than an order of a court, embodying the words of a magistrate which directs a law enforcement officer to carry out the directive of seizing evidence for return to the court for trial. Judge O'Connor's oral seizure order at the store constituted a de facto warrant, and was mandatory whether executed before or after it was reduced to a final draft in the court's records.

The issuing judge need not view each allegedly obscene work in its entirety in order to determine probable obscenity where an examination of the materials themselves and the circumstances surrounding their public distribution adequately provide the requisite amount of probable cause. It would work an intolerable burden upon the courts and law enforcement for this Court to require that the "taken as a whole" concept, as part of the "Miller test", be applied to probable cause determinations to the extent of mandating that a work must be viewed in its entirety before a warrant is justified. A warrant issued ex parte on a factual description is sufficient to "focus searchingly on the question of obscenity," and should be approved. The burden of satisfaction in search and seizure determinations is probable cause and not proof beyond a reasonable doubt. In a review of a finding of probable cause, a great deference should be given to the issuing magistrate and must be in a common-sense, rather than hypertechnical manner.

The determination of an issuing judge to seize allegedly obscene material, made on his own personal knowledge, satisfies the letter and the spirit of the first amendment protection of freedom of expression and of the Fourth Amendment prohibition against unreasonable search and seizure.

The intervention of Judge O'Connor provided a "higher hurdle" and allowed for an opportunity to "focus searchingly on the question of obscenity," ensuring that the courts, and not the police, are the arbiters of obscenity. Judge O'Connor's integrity and neutrality must not be questioned merely because of the surroundings where he held court, nor may his discretion to uphold the tests of the Fourth Amendment be unduly burdened.

The search and seizure in this case was only an initial and temporary restraint. Any individual errors which might have been made by Judge O'Connor could have been corrected the following day in the adversary hearing which Petitioner was offered. Petitioner's failure to request such a hearing was a waiver thereof, and should not be allowed to be used at a later time to claim an unlawful restraint on his ability to "exercise" his choice of expression by selling pornography. Under the circumstances, Judge O'Connor's actions adequately protected all the rights to which Petitioner was entitled under the Constitution, and should be approved.

The states still retain power to develop workable rules governing arrests and searches andseizures, to meet the practical demands of effective criminal investigation and law enforcement in the states, provided only that those

rules do not violate the Fourth Amendment proscription of unreasonable searches and seizures. "Reasonableness" of the intrusion is determined by the context. The "seizure" employed in the instant case meets the test of "reasonableness" as articulated and interpreted by the Supreme Court.

The activities of the police officers and Judge O'Connor on June 25, 1976 did not constitute a "search" within the meaning of the Fourth Amendment. The capacity to claim the protection of the Fourth Amendment against unreasonable searches depends not upon a property right in the invaded place, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. An overly technical definition of "search" turning upon an artificial hierarchy of events is not to be preferred.

What a person knowingly exposes to the public is <u>not</u> a subject of Fourth Amendment protection. Police officers may walk into a store or other commercial establishment which is open to the public, and observe whatever is in plain sight without committing a "search" within the meaning of the Fourth Amendment.

The Fourth Amendment protects against intrusions into the security and privacy that a person has attempted to surround himself with. It is this

"expectation of privacy" which is the touchstone by which we recognize excessively intrusive governmental activity. Where an individual has chosen to thrust his property into the public view, and in fact, solicit it to public examination of his property, he cannot be heard to complain that his "privacy" has been intruded upon when public officials accept his invitation.

The inclusion of more than a single copy of each item in the seizure order did not constitute a "suppressive" seizure. This Court has not reduced the question of whether a seizure is proper to a mere exercise in counting. Under Heller, supra, the test for the propriety (based on the quantity) of a seizure is essentially twofold: (1) Were the owners of the property afforded a procedure and/or opportunity to avail themselves of a speedy adversary hearing to determine if the seizure had been improper, and (2) Was the seizure so massive and so pervasive as to constitute a prior restraint? These issues must be balanced together with the overall circumstances of the seizure. The Constitutional requirements were met.

In closing, the seizure of the 26 film projectors was proper, both under criminal procedure law, section 690.10(3), as personal property used to commit a crime, and under penal law, section 410.00, as contraband.

For all of the foregoing reasons, this Court should affirm the decision below.

ARGUMENT

I

THE NEW YORK SEARCH WARRANT STATUTE, AS CONSTRUED AND APPLIED HEREIN, WHICH PERMITS AN ISSUING JUDGE WHO IS CONDUCTING A HEARING ON AN APPLICATION FOR A SEARCH WARRANT TO HOLD COURT AND RECEIVE EVIDENCE AT A BUSINESS WHICH IS OPEN TO THE PUBLIC, FOR THE PURPOSE OF MAKING A "PROBABLE CAUSE" DETERMINATION AS TO THE OBSCENITY OF CERTAIN OF THE INDIVIDUAL ITEMS POSSESSED, EXHIBITED OR OFFERED FOR SALE AT SUCH BUSINESS, PRIOR TO THEIR SEIZURE UNDER A SEARCH WARRANT, DOES NOT VIOLATE THE FOURTH AMENDMENT AS AN UNREASONABLE SEARCH AND SEIZURE.

A. Introduction

On the last day of the 1967 Term, this Court, without benefit of briefing on the merits or oral argument, decided Lee Art Theatre v. Virginia, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103, (June 17, 1968). That opinion, brief though it was, created the "adversary hearing" issue and placed in the hands of the pornographers' attorneys a weapon which was to confound and confuse law enforcement for the next five years.

In the Lee Art Theatre case, a seizure of two films under a search warrant which named the films by title as "Rent A Girl," and "Erotic Touch of Hot Skin" (playing as a double bill at a local public theatre) was held to be unlawful. The equivocal language used by the Court was,

at page 1315:

> "The admission of the films in evidence requires reversal of petitioner's conviction. A seizure of allegedly obscene books on the authority of a warrant 'issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered obscene' was held to be an unconstitutional seizure in Marcus v. Search Warrant, 367 U.S. 717, 731-732, 6 L.Ed.2d 1127, 1135, 1136, 81 S.Ct. 1708. It is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' id., at 732 6 L.Ed.2d at 1136, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See Freedman v. Maryland, 380 U.S. 51, 58-59, 13 L.Ed.2d 649, 654, 655, 85 S.Ct. 734." (Our emphasis).

The Pandora's box which Lee Art Theatre v. Virginia, supra, opened, with its suggestion that the issuing justice of the peace may be required to view the subject matter before issuing the search warrant presented the "red herring" which became one of the central issues in the New York Courts in Heller v. New York, supra, and in a

number of other cases before this Court during the 1972 October Term.[8/]

In 1971, the New York Court of Appeals in Heller v. New York, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651, (Dec. 1, 1971) solved the Lee Art Theater problem by interpreting the New York search warrant statute to authorize an issuing judge, who was conducting a hearing on an application for a search warrant, to hold Court and receive evidence at the public theater where the allegedly obscene film was being exhibited to the public, for the purpose of making a "probable cause" determination as to the obscenity of that film, prior to its seizure under the search warrant

8/ The "adversary hearing" red herring destroyed the effectiveness of law enforcement. The confusion it has engendered permitted the pornographers, in the short period of 10 years to take hard-core pornography, such as the hard-core film, out from under the counter and use in private exhibitions, and extended it to public exhibitions in the sleazy porno theaters on Main Street and in Art Theaters in remote parts of good neighborhoods, then to public audiences in neighborhood store-converted and other regular theater houses (abandoned because of "TV" use and other economic changes), and finally into the family home itself through "TV" use and the video-tape format. If the rule still abides in our Anglo-Saxon legal system that the Courts are the guardians of the public morals, see Rex v. Curl, 2 Strange 789 (1927); Sir Charles Sedley's Case, 1 SID 168, then the decisions of this Court, which have permitted this condition to arise, must be faulted.

therein being applied for. When the New York Court of Appeals, six years later, upheld the judgment of the trial court below in Lo-Ji Sales, Inc., that Court did nothing more than give further definition to the New York Search Warrant Statute and extend the procedure approved by this Court in Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789 (June 25, 1973) to a commercial store which is alleged to be openly trading in obscene items, so as to authorize an issuing judge who is conducting a hearing on an application for a search warrant, to hold Court and receive autoptical evidence (in lieu of the usual affidavit evidence) at the store where films, books, magazines, and other articles are being exhibited and offered for sale to the public, for the purpose of making a "probable cause" determination as to the obscenity of certain of the individual items in such store, prior to their seizure under the search warrant.

B. The Construction Of Article 690 (Search Warrants) Of The Criminal Procedure Law, Adopted By The New York Court Of Appeals, Is Binding On This Court.

The interpretation given by the New York Court of Appeals in petitioner's case, that the issuing Court can take a view of the premises which are open to the public, and can receive

evidence on the items which are offered for sale to the public at that location is consistent with prior decisions. Saul Heller v. New York, supra. Amicus submits that the definitive interpretations give in Heller, supra, and in Lo-Ji Sales, Inc., that such procedures are authorized by the New York Search Warrant Statute is completely non-reviewable by this Court. This Court must accept the state court's construction and proceed to test its validity on that basis, under the traditional standard of "reasonableness" General Trust Co. v. Blodgett, 287 U.S. 590, 573; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688.9/

9/ This Court said in Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 3 L.Ed.2d 1512, 79 S. Ct. 1362 (June 29, 1959), involving New York's obscenity statute and the motion picture film "Lady Chatterley's Lover," at page 688: "(W)e accept the premise that the motion picture here in question can be so characterized. We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. . . ." (Our emphasis).

C. The New York Procedure Which Permits An Issuing Judge To Hold Court And Receive Autoptical Evidence At A Business Which Is Open To The Public, Prior To Any Seizure Under The Search Warrant, Is An Enlightened View.

As the Chinese proverb has noted: "One picture is worth more than ten thousand words." The "reasonableness" of any seizure depends upon a host of variables, including, where a determination must be made that there is "probable cause that the subject matter is obscene," the circumstances surrounding the business itself. See Pinkus v. California, ___ U.S. ___, 56 L.Ed.2d 293, 302, 98 S.Ct. ___ (May 23, 1978) where this Court held:

> "Pandering is 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' Ginzburg v. United States, supra, at 467, 16 L.Ed.2d 31, 86 S.Ct. 942. We have held, and reaffirmed, that to aid a jury in its determination of whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. Splawn v. California, 431 U.S. 595, 598, 52 L.Ed.2d 606, 97 S.Ct. 1937 (1977); Hamling v. United States, supra, at 130, 41 L.Ed.2d 590, 94 S.Ct. 2887. In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation."

Paragraphs 3 and 4 of Investigator Hurbanek's affidavit (See Statement of Facts at pages 9 and 10 supra) informed the issuing Court that the two films which he had purchased "Linda and Duke" and "Four for Dinner" depicted female masturbation, attempted sexual intercourse between a female and a German Shepard type dog, sodomy, fellatio, and cunnilingus, and that other films and magazines which were also offered for sale portrayed similar activities. Had Hurbanek played it safe and simply requested the seizure of all copies of the two films which were exhibited to the Court, there is little likelihood that the attack on the search warrant would have been pursued so diligently by Lo-Ji Sales, Inc. The law enforcement result, however, would not have been the same. Without Hurbanek having pursued other means of obtaining the materials in question, the type of misdemeanor complaint which could have been filed against Lo-Ji Sales, Inc. would not have accurately depicted the criminal nature (pandering) of that business (See Statement of Facts at pages 12-17, supra, and the "Receipt and Inventory" of items seized, appearing at Appendix F-1 through F-15 of this amicus brief.)

(1) Having received notice through Investigator Hubanek's affidavit of the pandering nature of petitioner's business, the issuing judge had a moral responsibility to respond to the request that he take a view of the premises and examine the stock in trade for "probable cause" as to obscenity.

It was long ago decided that the Courts in our Anglo-Saxon legal system are the guardians of the public morals. Rex v. Curl, 2 Strange 789 (1727), Sir Charles Sedley's Case, 1 SID 168. When Judge O'Connor was put on notice through Investigator, Hubanek's affidavit of the pandering nature of petitioner's activity, he had a moral responsibility to respond to Hurbanek's request that he take a view of the premises and examine the stock in trade for probable cause as to "obscenity."

The common law notion was, and is, that obscenity should be proscribed because it prevents a moral public nuisance. Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S and R (Penn.) 91; 7 Am.Dec. 632. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Woods describes the danger as being in the nature of a "nuisance per se."

See "The Law of Nuisances" by H.G. Wood, Sections 23 and 24, at pp. 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public

decency."

"Section 24. Wrongs malum in se. -- This class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

That municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law and basic civil rights inherent in individuals, rather than from "express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Woods, Section 743, at p. 972:

"Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no

question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

Joyce, in his treatise "Law of Nuisance", Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance; at p. 498:

"The rule is declared to be settled, without

dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution."

The importance of this abatement power was stressed by the United States Supreme Court in James Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. . ."

"It is a principle of the common law, that the king cannot sanction a nuisance. . ."

(2) The fourth amendment does not require that investigator Hurbanek exhaust all other possible means of obtaining the materials in question before making application for a search warrant.

Perhaps the simplest means for law enforcement to obtain the necessary evidence would be to purchase the films and magazines with public funds. When the quantity of different materials becomes as large as in this case, however, such costs become an unreasonable burden on the public treasury. Books and magazines in "adult book stores" range from $5.00 to $25.00 a piece and the films and video-tape cassettes range from $50.00 on up to $100.00 and beyond. When the number of different items reaches into the several hundreds, as in this pandering situation, the cost becomes prohibitive. If no procedure is available for recouping the funds from the defendant, an absurd result is achieved wherein the defendant profits and government suffers from the law enforcement efforts (even after payment of a fine). Where large scale pandering is involved, the purchase of such materials is totally impractical and unworkable, except where used as a basis for establishing grounds for a procedure similar to that used in this case.

While it may be suggested that a single massive purchase, followed by an immediate arrest

and seizure of the money paid, would provide an answer, that law enforcement tactic would not solve the problem of how to marshall the evidence where no "sale" was involved and the crime alleged is that of "exhibiting" an obscene film in a vending machine for short periods of time upon the deposit of a quarter in the slot. Further, such a purchase would be subject to attack under a Fourth Amendment claim that the purchase was a sham and was intended to accomplish an unlawful seizure of materials which were presumptively protected by the First Amendment, without the need for a formal search warrant.

Two other judicial procedures which have been utilized to obtain evidence in such cases; the subpoena duces tecum and the restraining order, have proved to be wholely unsatisfactory. A prime example of the inadequacy of the subpoena duces tecum process is shown in a San Gabriel, California Sun news article, dated February 1, 1978 reporting on the history of a two year legal attempt to oust a similar "adult book store" from Alhambra, California. (See Appendix G-1 and G-2 to this amicus brief). An equally frustrating experience with the use of the subpoena duces tecum process in a film case can be found in the files of this Court in Fair, Sheriff of Allen County, Ohio v. Robert Smith and Otis Hatfield,

421 U.S. 902, 43 L.Ed.2d 769, 95 S.Ct. 1549 (Apr. 14, 1975). As to the difficulties had with restraining orders, see the opinion of U.S. District Judge Fitzgerald in Spokane Arcades, Inc. v. Ray, 449 F.Supp. 1145, 1157 (Feb. 6, 1978).

A requirement that a subpoena duces tecum be used in place of the search warrant herein employed could only be justified under some variant of the "less drastic means" concept that ". . . a governmental practice which impairs constitutional values can be successfully challenged on the grounds that an alternate procedure exists which can accomplish more or less the same and at less cost to the threatened values." See note, 86 Harv.L.Rev. 1317, 1322 (1973) and Sheldon v. Tucker, 364 U.S. 479, 488, a First Amendment case wherein this Court stated:

> ". . . Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end could be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose. . ."

There has, unfortunately, been an attempt in recent years to extend the "less drastic means" concept into the Fourth Amendment area. See Stanford Daily v. Zurcher, 356 F.Supp. 124, aff'd

per curiam, 550 F.2d 464 (9th Cir. 1977), wherein Judge Peckham and the Ninth Circuit held that where third persons were operating within an area protected by the First Amendment (publication of a newspaper), a search warrant could not be issued to obtain evidence where it was at all possible to obtain the same material by means of a subpoena duces tecum.

On review, this Court reversed, rejecting both the finding and the analysis, in Zurcher v. Stanford Daily, 436 U.S. 547 at 567:

> "We accordingly reject the reasons given by the District Court and adopted by the Court of Appeals for holding the search for photographs at the Stanford Daily to have been unreasonable within the meaning of the Fourth Amendment and in violation of the First Amendment."

Further, this Court specifically held that the choice between subpoena and search warrant was one to be made on a practical basis, by the prosecutor, and that one of the primary considerations was which of the two would most likely secure the evidence, and prevent its destruction, at page 562:

> "In the normal course of events, search warrants are more difficult to obtain than subpoenas, since the latter do not involve the judiciary and do not require proof of probable cause. Where, in the real world, subpoenas would suffice, it can be expected that they will be employed by the rational prosecutor. On the other hand, when choice is available under local law and the prosecutor chooses to use the search warrant, it is unlikely that he has needlessly selected the more difficult course. His choice is more likely to be based on the solid belief, arrived at through experience but difficult, if not impossible, to sustain in a specific case, that the warranted search is necessary to secure and to avoid the destruction of evidence."

If this Court is willing to recognize that there exists a likelihood of destruction of evidence by an innocent third party, which is sufficient to justify the issuance of a search warrant, such reasoning becomes even stronger where the evidence is to be obtained directly from the defendant. Such a subpoena duces tecum directed to a defendant would doubtlessly be met with a claim that the evidence required no longer exists, or, as was claimed in the Alhambra case noted above, was sold in the normal course of business.

(3) The requirement for pre-seizure judicial scrutiny of allegedly obscene materials compelled the issuing judge to become more intimately involved than in ordinary search and seizure activities by police officials.

Because of the potential intrusions into areas protected by the First Amendment, this Court has seen fit to rule that the authority of police officers to seize allegedly obscene

materials is much more severely restricted than in the case of other forms of contraband. See, Roaden v. Kentucky, 413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (June 25, 1973) at page 763:

> "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. (Citations omitted.) The question to be resolved is whether the seizure of the film without a warrant was unreasonable under Fourth Amendment standards and, if so, whether the film was therefore inadmissible at the trial. The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' (citations omitted) are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards."

The Roaden opinion goes on to establish a higher standard for seizure of materials arguably protected by the First Amendment:

> "Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books of films, calls for a higher hurdle in the evaluation of reasonableness."

Thus, this Court has imposed a requirement

for judicial scrutiny prior to seizure of First Amendment area materials. Further, since such a warrant must, like any other warrant, issue only on probable cause, the judicial officer issuing it must have presented to him sufficient facts to satisfy himself that such probable cause exists. As in any other warrant situation, mere conclusory opinions by police investigators will not support the proper issuance of a warrant. A view of the premises therefore, was clearly warranted.

In the context of a bookstore selling hundreds or even thousands of separate items, many or all of which are claimed to be obscene, this requirement of pre-judicial scrutiny places major mechanical burdens on the police and court systems. The practical problems involved in satisfying constitutional requisites, and at the same time insuring some degree of success against individuals who are both willing and able to exploit the protections of the Fourth Amendment for their own ends, have resulted in a number of innovative techniques. Among these are the viewing and sidewalk signing of a warrant by a judge as used in the Heller case, and the use of telephonic applications for search warrants as authorized under the laws of certain states, (California and Arizona); see United

States v. Turner, 558 F.2d 46. The technique employed by Judge O'Connor in this case is designed to satisfy both the constitutional requirement of pre-seizure judicial scrutiny and the exigencies of the circumstances. The alternative procedures (see discussion above) are unsatisfactory, and no less intrusive upon the rights of the petitioner.

(4) The issuing judge's oral order of seizure, which was based upon probable cause amounts to a constitutionally sufficient warrant, even though it is reduced to writing after the actual seizure and inventory.

One important fact to which attention has been drawn away by Petitioner's arguments is that the only difference, regarding the legal status of the judicial intervention and effect of the magistrate's order, between the instant case and the actions of the judge in Heller v. New York, supra, is that the judge in Heller reduced his order to writing immediately after his viewing and before the seizure. The judges in both this case and Heller "held court" at the business establishment for the purpose of taking evidence and a seizure took place immediately thereafter. In Heller, supra, the judge viewed the movie and signed a warrant, while at the theater, autho rizing both the seizure of the film and the

arrest of the exhibitors, and the order was immediately carried out by the police. In this case, the judge viewed two entire films before going to the store and issued a search warrant for these films, and thereupon adjourned his court to consider further evidence at the store which he felt would probably lead to further probable cause to order additional search and seizure. At the Petitioner's store, the judge examined the materials, ordered their immediate seizure and inventory, and then reduced his oral order to writing. The "safeguards" existing between the police and the defendants were the same in each instance. The "higher hurdle" of judicial intervention was equally provided for, with the added protection of an "immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law". (See page 12, supra)

It cannot be avoided that Judge O'Connor's oral seizure order at the store constituted a de facto warrant, even if not pro forma until later entered into the written warrant as an inventory and specification. A search warrant is nothing more than an order of a court, embodying the words of a magistrate, which directs

a law enforcement officer to carry out the directive of seizing evidence for return to the court for trial. The judge's order is mandatory whether executed before or after it is reduced to final draft in the court's records. Such happens every day when a judge sentences a defendant to imprisonment and orders the bailiff or police to remand a prisoner into custody, and then signs a commitment order or judgment entry. The legal effect of Judge O'Connor's orders at this store were nonetheless mandatory and proper.

Situations such as this are provided for by law in the New York Judiciary Law, Section 2-b (3), which grants courts the power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it". If a court has the power to make a certain kind of decree, it can devise a form of proceeding to carry out that power. Rosenfeld v. Savings Bank of Utica, 173 Misc. 667, 17 N.Y.S.2d 652 (1940); People v. Schnitzler, 18 N.Y.2d 457, 461, 276 N.Y.S.2d 616, 619 (1966). See also: State v. Luck, 353 So.2d 225 (La. Sup. Ct. 1977); and McKinney v. City of Birmingham, 296 So.2d 197 (Ala. Sup. Ct.), cert. denied, 420 U.S. 950 (seizure upheld where judge viewed alleged obscenity, even though no required under law).

The review by this Court of judicially approved and statutorily included procedure adopted by this local New York justice is that of a search warrant, partly written and partly oral, which nevertheless disposes of Petitioner's claims of being the victim of an unlawful "warrantless seizure".

(5) The issuing judge need not view each allegedly obscene work in its entirety in order to determine probable obscenity where an examination of the materials themselves and the circumstances surrounding their public distribution adequately provide the requisite amount of probable cause.

Even though the police officers in this case were executing a search warrant at the immediate direction of Judge O'Connor, the order of the court must be supported by adequate probable cause to believe that a crime was being committed and that the materials themselves were probably obscene. Judge O'Connor was first apprised of the full content and character of two films where were purchased by officer Hurbanek, and the judge further learned, through the officer's affidavit in support of the application for the search warrant, that other similar films and sexually oriented materials were present at the "Adult Store". Mr. Mandakis even admitted that other films, books, and magazines in his

store contained similar depictions and descriptions of explicit sexual conduct. This fact was obviously apparent to Judge O'Connor immediately upon his entry to this establishment. This "Adult Store" was a world unto itself, devoted exclusively to pornography and sexually oriented goods and services, and unmistakenly harkened anyone, who would enter, to explore the prurient paradise therein.

Given these circumstances, it would not be expected to take long to realize what type of "expression" was being "presumptively protected" by this business. Obscenity is not so hard to recognize. This Court's guidelines of Miller v. California, 413 U.S. 15, at 24-25 (1973), can run through one's mind uninterrupted, in the face of such explicit sexual display. In upholding the validity of 18 U.S.C. § 1461, as construed to include the "Miller Test", this Court noted in Smith v. United States, 431 U.S. 291, at 309 (1977), that "the type of conduct covered by the statute can be ascertained with sufficient ease to avoid due process pitfalls".

It would work an intolerable burden upon the courts and law enforcement for this Court to require that the "taken as a whole" concept, as part of the "Miller Test", be applied to probable cause determinations to the extent of mandating

that a work must be viewed in its entirety before a warrant is justified. There have been many cases, following the guidelines of Roaden v. Kentucky, supra, which have held that a search warrant can issue upon a factual description of the contents of the allegedly obscene material being provided to a court by a police officer. See: State v. Burgun, 56 Ohio St.2d 354, 362, 384 N.E.2d 255, 261 (Ohio Sup. Ct. 1978), reh. den. 1-17-79; City of Duluth v. Wendling, 237 N.W.2d 79, 83 (Minn. Sup. Ct. 1975); People v. Hobbs, 375 N.E.2d 1367, 1372-73 (Ill. App. Ct. 1978); Commonwealth v. Mascolo, 375 N. E.2d 17, 21-22 (Mass. App. Ct. 1978); Robinson v. City of Birmingham, 353 So.2d 528 (Ala. Cr. App. 1977), rev. den. 353 So.2d 534 (Ala. Sup. Ct. 1977), cert. den. 56 L.Ed.2d 777 (May 30, 1978); State v. Conaughty, 561 P.2d 554 (Okla. Cr. App. 1977); People v. Schnitzler, supra; United States v. Echols, ___F.2d ___, 4 Med. L. Rep. 1170 (5th Cir. 7-28-78); United States v. Sherwin, 572 F.2d 196, 198 (9th Cir. 1977); United States v. Pryba, 502 F.2d 391, 410 (D.C. Cir. 1974); Peto v. Cook, 364 F. Supp. 1, 4 (S.D. Ohio E.D. 1973). There have also been a few cases where the issuing judge actually viewed the material. Heller v. New York, supra: Western Corp. v. Commonwealth, 558 S.W.2d 605

(Ky. Sup. Ct. 1977); McKinney v. City of Birmingham, supra. Where the reviewing magistrate has the time and opportunity to view a work in its entirety, that is ideal, but where a warrant is issued ex parte on a factual description, this is also sufficient to "focus searchingly on the question of obscenity" and should be approved.

It is well established that the burden of satisfaction in search and seizure determinations is probable cause and not proof beyond a reasonable doubt. Additionally, a review of a finding of probable cause must show great deference to the issuing magistrate and must be in a commonsense, rather than a hypertechnical, manner. United States v. Ventresca, 380 U.S. 102, 109 (1965); People v. Hendricks, 25 N.Y.2d 129, 303 N.Y.S.2d 33, 250 N.E.2d 323 (1969); People v. Shiffrin, 64 Misc.2d 311, 314 N.Y.S.2d 745 (1970); Commonwealth v. Mascolo, supra, at 21-22; People v. Hobbs, supra, at 1372. Under the general rule, practical elements which enter into everyday life, and on which reasonable and prudent men act, are to be considered. People v. Teams, 20 A.D.2d 803, 248 N.Y.S.2d 477 (1964), rev. den. 14 N.Y.2d 943. See also: Brinegar v. United States, 338 U.S. 160, 175 (1949). As simply stated in People v. Rodger, 28 A.D.2d 625, 280 N.Y.S.2d 174 (1967):

> "Probable cause" for issuance of a search warrant exists when there is reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated on the premises to be searched.

When a judge does visit an "adult book store", and there exists enough knowledge on his part, plus enough direct and circumstantial evidence that certain materials are probably obscene, there should be no impediment to his ordering their seizure. In this case, Judge O'Connor could consider the contents of the two films he viewed, the fact that this store was exclusively filled with blatantly explicit sexual materials, that the content of the material did not vary as to their explicitness in showing actual scenes of ultimate sexual acts and lack of extraneous written or non-sexual content, and that the store was obviously "pandering" to the prurient appeal of these materials. This supporting evidence surely buttresses the existence of cause to believe that the materials he personally examined were probably obscene and it was therefore within his rightful power to order seizure.

Since Judge O'Connor is to be held to a lesser standard of proof than required for a final determination of obscenity vel non at trial, he should also be allowed the benefit of

the principles which would aid in finding Obscenity at trial. First, the Judge should benefit from the principle that the materials are "sufficient in themselves for the determination of the question" of obscenity. Kaplan v. California, 413 U.S. 115, at 121 (1973) (where the Court noted at 117, the character of the book then before it: "Whether one samples every 5th, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.") Second, Judge O'Connor should be able to avail himself of the strong circumstantial evidence that these materials were being "pandered" for their prurient appeal, and this principle alone can determine close cases on individual decisions to order seizure.

This principle is best shown in Ginzburg v. United States, 383 U.S. 463, at 471 (1966), where "Eros" magazine was found obscene "as a whole" when "only four of the 15 articles predominantly appealed to prurient interest . . . (because) . . . like the other publications, its prevasive treatment of sex and sexual matters rendered it available to exploitation by those who would make a business of pandering to the 'widespread weakness for titillation by pornography'." This Court in Ginzburg, at 474-75, announced a rule of law which applies readily in support of Judge O'Connor's findings:

> We preceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question. . . .(T)he fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.

The force of this principle was affirmed in Splawn v. California, 431 U.S. 595, 599 (1977), and Hamling v. United States, 418 U.S. 87, 130 (1974), where this Court upheld the right to charge a jury on the consideration of "motives of commercial exploitation" and "circumstances of production, sale, . . . advertising . . . editorial intent . . . "in order to assist the final determination of obscenity. This assistance should be no less for an interim determination of probable obscenity by a magistrate.

(6) The determination of an issuing judge to seize allegedly obscene material, made on his own personal knowledge, satisfies the letter and the spirit of the First Amendment protection of freedom of expression and of the Fourth Amendment prohibition against unreasonable search and seizure.

Putting aside the individual factual conclusions which may be made as to each individual item seized, Amicus submits that the general theory underlying a neutral magistrate visiting an "adult bookstore" and personally determining

probable cause for seizure is well within the letter and spirit of our Constitution. In order to provide a "higher hurdle" and allow for an opportunity to "focus searchingly on the question of obscenity", under Roaden v. Kentucky, supra at 502-04, the intervention of Judge O'Connor was duly provided. The purpose of these safeguards is that the police are not the arbiters of obscenity, it must be the courts. Marron v. United States, 275 U.S. 192, 196 (1972); Andersen v. Maryland, 427 U.S. 463, 480 (1976); Marcus v. Search Warrant, supra at 732; Heller v. New York, supra. Judge O'Connor's integrity and neutrality must not be questioned merely because he held court in such foreboding surroundings. De fide et officio judicis non recipitur quaestio.

Once it is established that a judicial officer may adequately protect the sensitive values of our First Amendment, his discretion to uphold the tests of the Fourth Amendment need not be unduly burdened. As stated candidly by the court in Robinson v. City of Birmingham, 353 So.2d 528, at 530-31 (Ala. Cr. App. 1977), rev. den. 353 So.2d 534 (Ala. Sup. Ct. 1977), cert. den. 56 L.Ed.2d 777 (May 30, 1978):

> In this case, no more artisty is involved than in that of the hit-and-run pervert who scratches his vulgarisms upon the walls of the dirtiest public and private places in the world, to

> vie with the surrounding putrescence from which the normal traveller as soon as possible retreats.
>
> The blatant facts, as shown here, without further detail, enabled the magistrate to make an assessment as to the whole production, to the extent, at least of determining the existence of probable cause.... The searching focus required is necessarily relative and is dependent upon the object focused upon. In this case, no telescope, no microscope, no spectacles were required.

There should be no higher burden upon probable cause than upon the requirement that scienter be shown at trial, at least in those instances where a judge personally handles the material. It is accepted that a defendant need not know that his materials are obscene, or even know the specific contents thereof, where if is clear that he knows the character and nature of the works involved. Smith v. California, 361 U.S. 147, 155 (1959); Hamling v. United States, 418 U.S. 87, 119-23 (1974) (Instruction on "character" approved); Mishkin v. New York, 383 U.S. 502, 510 (1966) ("Character" adequate); United States v. Glassman, 562 F.2d 954 (5th Cir. 1977) (must know of "sexual orientation"); State v. Burgun, supra, 384 N.E.2d, at 262 (Ohio Sup. Ct. 1978) ("character"); Johnson v. State, 351 So.2d 10 (Fla. Sup. Ct. 1977) ("nature or content"):

State v. American Theatre Corp., 244 N.W.2d 56 (Neb. Sup. Ct. 1976) (where magazines sealed in clear plastic). The circumstances inherent in the "adult" pornography industry cannot be ignored when viewed to determine violations of obscenity laws. As stated in People v. Moore, 368 N.E.2d 586, at 588 (Ill. Ct. App. 1977):

> It is well settled in Illinois even casual examination of the cover of a magazine which is obscene is sufficient to establish defendant's liability for violation of the Illinois obscenity statute.... In the instant case the trial court found the defendants knew or should have known from the scenes on the covers of these magazines, the magazines were obscene. Considering all the circumstances surrounding the defendants in these cases: (1) their employment in "adult book stores; (2) their observation of the covers of these magazines; (3) the titles of the magazines; (4) the price of the magazines; and (5) the sale solely to adults....

The New York courts have rendered an opinion approving of Judge O'Connor's method, and Judicially included this as "within the intent and meaning of the statute", in Monserrate v. Upper Court Street Book Store, Inc., 62 A.D.2d 419, 405 N.Y.S.2d 145, at 146 (May 25, 1978):

> The procedure adopted by the County Court in visiting the various stores and making a personal inspection is not required by the statute and is novel and should not be lightly disregarded. The impartial Judge rather than the enforcement authorities was exercising his judgment as to whether the exhibits previously confiscated by the police, but left in each store, were obscene....
> (See also: G.I. Distributors, Inc. v. Murphy, 490 F.2d 1167 (2nd Cir. 1973))

The search and seizure in this case was only an initial and temporary restraint. Any individual errors which might have been made by Judge O'Connor could have been corrected the following day in the adversary hearing which Petitioner was offered. Petitioner's failure to request such a hearing is a waiver thereof, and should not be allowed to be used at a later time to claim an unlawful restraint on his ability to "exercise" his choice of expression by selling pornography.

Amicus submits that, under the circumstances, Judge O'Connor's actions adequately protected all the rights to which Petitioner was entitled under the Constitution, and should be approved.

D. The "Seizure" Employed In The Instant Case Meets The Test Of "Reasonableness" As Articulated And Interpreted By The Supreme Court.

Although this Court's decision in Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 18 A.L.R.2d 933, rehearing denied 368 U.S. 871, 7 L.Ed.2d 72, 82 S.Ct. 23, imposed the requirements of the Fourth Amendment and the accompanying exclusionary rule on the states, Mapp did not totally obliterate state laws relating to search and seizure. The states still retain power to develop workable rules governing arrests and searches and seizures, to meet the practical demands of effective criminal investigation and law enforcement in the states, provided only that those rules do not violate the Fourth Amendment's proscription of unreasonable searches and seizures. See Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 233; Ker v. California, 374 U.S. 23, 10 L.Ed. 726, 83 S.Ct. 1623. Thus, a state is free to develop its own law of search and seizure to meet the needs of local law enforcement.

Recently, in United States v. Chadwick, 433 U.S. 1, the Supreme Court reaffirmed the principle that the Fourth Amendment "protects people, not places," and "more particularly, it protects people from unreasonable governmental

intrusions into their legitimate expectations of privacy." Chadwick, at page 70. The reasonableness of those intrusions is determined by the context (the area in, and circumstances under, which they take place, and the nexus between individual's privacy interests and government interests in searching and seizing.) A liberal construction of the Fourth Amendment protection of "the sanctity of a man's home and the privacies of life" has emphasized the fact that the amendment gives constitutional effect to the common law maxim "a man's house is his castle" and thereby serves to protect the core of an individual's activities and expectations of privacy. However, by attaching the constitutionally protected area of privacy to the individual and the nature of his activities, governmental intrusion has been allowed, in varying degrees, into those activities of the individual in which he manifests no expectation of privacy.

Thus, a sliding scale is established. At one end are a private individual's most personal affairs and effects. Here the strongest justifications for governmental intrusion will be required. At the other end of the scale are those activities which are carried on in an open and public manner, and in which an individual invites the participation and/or cooperation of

other individuals from the public. In this type of activity, the individual has the least expectation of privacy, and therefore governmental intrusion is constitutionally permissible with only a minimal showing of "reasonableness."

The facts of the case presented here fall at the latter end of the scale. Thus, the "reasonableness" standard which must be applied is a minimal one.

E. The Activities Of The Police Officers And Judge O'Connor On June 25, 1976, Did Not Constitute A "Search" Within The Meaning Of The Fourth Amendment.

It is a general rule that the capacity to claim the protection of the Fourth Amendment against unreasonable searches depends not upon a property right in the invaded place, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. An overly technical definition of "search" turning upon an artificial hierarchy of events is not to be preferred. Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868.

Thus, what a person knowingly exposes to the public is not a subject of Fourth Amendment protection, Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507. Although it is recognized that the scope of the Fourth Amendment

protection against unreasonable search extends to a store, Lanza v. New York, 370 U.S 139, 8 L.Ed.2d 384, 82 S.Ct. 1218, it is established that police officers may walk into a store or other commercial establishment which is open to the public, and observe whatever is in plain sight without committing a "search" within the meaning of the Fourth Amendment, Mancusi v. De Forte, 342 U.S 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120; New York v. Finkelstein, 28 Misc.2d 771, 218 N.Y.S.2d 341; New York v. Matherson, 16 N.Y. 2d 509 (Apr. 22, 1965).

In the instant case, both petitioner and respondent agree that the subject premises was a retail store, openingly displaying merchandise to any member of the public who chose to enter, and that such merchandise was available for examination by the public. Further, both petitioner and respondent agree that the public officials (police officers, agents of the public prosecutor, and the judge) entered the subject premises during its normal business hours, and concerned themselves with materials which were on display for sale to the public. Petitioner has not contended that the public officials intruded upon any areas of the building not normally open to the public, nor have they contended that any of the materials in question were seized from

areas of the premises not normally open to the public. Further, the respondents have not contended that any of the materials seized were not on display or were not available for examination and purchase by any member of the public entering the premises. Thus, up to the point of the actual seizure, the group of public officials was doing precisely what the proprietor intended that members of the general public should do: Examine the merchandise of the store.

It is important to recognize that this case does not present the situation of a search conducted by a judicial official. A far different situation would be presented were a group of police officers to present themselves at an individual's home or private office, armed with a judge, expecting to rummage through an individual's private possessions and hoping to find evidence of a crime which could then be ordered searched for and seized by the accompanying judicial officer. The Fourth Amendment protects against intrusions into the security and privacy that a person has attempted to surround himself with. It is this "expectation of privacy" which is the touchstone by which we recognize excessively intrusive governmental activity. See Katz, supra. Thus, where an individual has chosen to thrust his property into the public view,

and in fact, solicit it to public examination of his property, he cannot be heard to complain that his "privacy" has been intruded upon when public officials accept his invitation.

F. The Inclusion Of More Than A Single Copy Of Each Item In The Seizure Order Did Not Constitute A "Suppressive" Seizure.

Petitioners rely on United States v. Thirty-seven Photographs, 402 U.S. 363; Freedman v. Maryland, 380 U.S. 51; Markus v. Search Warrants, 367 U.S. 717; and A Quantity of Books v. Kansas, 378 U.S. 205, for the proposition that any seizure of allegedly obscene materials prior to a full and complete adversary hearing must be limited to a single copy of each item seized. This proposition constitutes a misreading, both of these cases, and this Court's decision in Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789 (June 25, 1978). It is clear that this Court has not reduced the question of whether a seizure is proper to a mere exercise in counting.

Under Heller, the test for the propriety (based on the quantity) of a seizure is essentially two-fold: (1) Were the owners of the property afforded a procedure and/or opportunity to avail themselves of a speedy adversary hearing

to determine if the seizure had been improper; and (2) Was the seizure so massive and so pervasive as to constitute a prior restraint? As in all examinations of a seizure of property, these issues must, of course, be balanced together with the overall circumstances of the seizure. See Heller at page 752:

> "In this case, of course, the film was not subjected to any form of 'final restraint,' in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to preserve it as evidence. There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself 'become a form of censorship.' even making the doubtful assumption that no other copies of the film existed."

It is interesting to note that, although petitioners cite Heller, they ignore this particular aspect of the decision. Further, petitioners have made no claim that the seizure of the materials involved a shutting down of the business, nor have they even attempted to claim that no other copies of the films and books seized were owned by or available to them. They merely make the abstract claim that all copies of certain books and films, which were on the premises at the time of the seizure, were removed. An examination of the Search and Seizure Receipt and Inventory (See Appendix F to this brief) shows that, in most

cases, only one or two copies were taken.

The Heller decision further analyzes the necessity of the requirement of a prompt judicial determination of the obscenity issue at page 753:

> "A judicial determination of obscenity, following a fully adversary trial, occurred within 48 days of the temporary seizure. Petitioner made no pre-trial motion seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired. Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of 'promptness' those delays caused by the choice of the defendant."

In the instant case, the petitioner does not claim that they were denied a prompt hearing. The seizure occurred on June 26, 1976. Petitioners chose to delay 33 days, until July 29, 1976, to move to suppress the evidence seized from the store. Once said motion was made, the hearing was scheduled and held on August 27, 1976, (62 days from the time of the original seizure, but only 29 days after the petitioners finally decided to avail themselves of their right to seek review of the seizure.)

G. The Seizure Of The 26 Film Projectors Was Proper, Both Under Criminal Procedure Law Section 690.10(3), As Personal Property Used To Commit A Crime, And Under Penal Law Section 410.00, As Contraband.

The 26 film projectors which were used in the 26 money operated machines to exhibit films in the booth area constituted personal property which was subject to seizure under section 690. 10 (3) as personal property used for the purpose of commission of an offense (See section 690.10 at appendix B-1 in this brief).

The seizure of the 26 film projectors was also authorized by Penal Law Article 410.00 which provides in part:

> "Any peace officer of this state may seize any equipment used in the. . . projecting of pornographic. . . motion pictures. . . and such equipment. . . shall be subject to forfeiture as hereinafter in this section provided".

See, however, People v. Lo Ji Sales Inc., 403 N. Y.S.2d 181 (Mar. 23, 1978) which refers to such section in a different context and notes: "The constitutionality of this particular section is said to be questionable (citations omitted)."

CONCLUSION

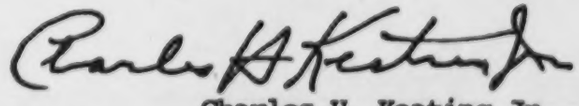
The confusion sponsored by this Court's decision in Lee Art Theater v. Virgina, supra, has not yet run its course. It would indeed be ironic were this Court to now tell the State of New York that, because it had conscientiously followed the per curiam opinion in that case, it was now in error.

The Search and Seizure Receipt and Inventory (See appendix E to this brief) clearly identifies Petitioner Lo-Ji Sales Inc., as an "Emporium for smut" (See Justice Frankfurter's opinion in Smith v. California, 361 U.S. 146, 161; 4 L.Ed.2d 205, 216; 80 S. Ct. 215 (Dec. 14, 1959)). The opportunity for law enforcement to bring such criminal activities under control will never be realized unless and until some muscle is restored to the search warrant authority of the 50 states. A large step in that direction will have been accomplished by this Court's stamp of approval on the New York procedure described herein.

For all of the fore going reasons, the judgment of the court below, should be affirmed.

DATED: February 26, 1979

Respectfully submitted,



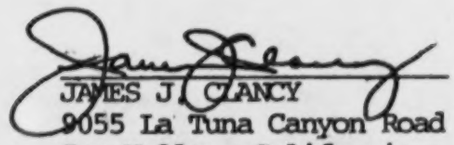
Charles H. Keating Jr.
Amicus Curiae

CERTIFICATE OF SERVICE

I, hereby certify that on this 26th day of February 1979, copies of the within Motion of Charles H. Keating, Jr., for Leave to File as Amicus Curiae in Support of Respondent were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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APPENDIX A

United States Constitution, Amendments I, IV, and XIV.

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

APPENDIX B

Criminal Procedure Law, Article 690 (Search Warrants): Sections 690.05, 690.10, 690.15, 690.20, 690.25, 690.30, 690.35, 690.40, 690.45, 690.50, and 690.55.

ARTICLE 690. (Search Warrants):

§690.05. Search warrants; in general; definition.—1. Under circumstances prescribed in this article, a local criminal court may, upon application of a police officer, a district attorney or other public servant acting in the course of his official duties, issue a search warrant.

2. A search warrant is a court order and process directing a police officer to conduct a search of designated premises, or of a designated vehicle, or of a designated person, for the purpose of seizing designated property or kinds of property, and to deliver any property so obtained to the court which issued the warrant.

§690.10. Search warrants; property subject to seizure thereunder.—Personal property is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it:

1. Is stolen; or

2. Is unlawfully possessed; or

3. Has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense; or

4. Constitutes evidence or tends to demonstrate than an offense was committed or that a particular person participated in the commission of an offense.

§690.15. Search warrants; what and who are subject to search thereunder.—1. A search warrant must direct search of one or more of the following:

(a) A designated or described place or premises;

(b) A designated or described vehicle, as that term is defined in section 10.00 of the penal law;

(c) A designated or described person.

2. A search warrant which directs a search of a designated or described place, premises, or vehicle, may also direct a search of any person present thereat or therein.

§690.20. Search warrants; where executable.—1. A search warrant issued by a district court, the New York City criminal court or a superior court judge sitting as a local criminal court may be executed pursuant to its terms anywhere in the state.

2. A search warrant issued by a city court, a town court or a village court may be executed pursuant to its terms only in the county of issuance or an adjoining county.

§690.25. Search warrants; to whom addressable and by whom executable.—1. A search warrant

must be addressed to a police officer whose geographical area of employment embraces or is embraced or partially embraced by the county of issuance. The warrant need not be addressed to a specific police officer but may be addressed to any police officer of a designated classification, or to any police officer of any classification employed or having general jurisdiction to act as a police officer in the county.

2. A police officer to whom a search warrant is addressed, as provided in subdivision one, may execute it pursuant to its terms anywhere in the county of issuance or an adjoining county, and he may execute it pursuant to its terms in any other county of the state in which it is executable if (a) his geographical area of employment embraces the entire county of issuance or (b) he is a member of the police department or force of a city located in such county of issuance.

§690.30. Search warrants; when executable.—1. A search warrant must be executed not more than ten days after the date of issuance and it must thereafter be returned to the court without unnecessary delay.

2. A search warrant may be executed on any day of the week. It may be executed only between the hours of 6:00 A.M. and 9:00 P.M., unless the

warrant expressly authorizes execution thereof at any time of the day or night, as provided in subdivision five of section 690.45.

§690.35. Search warrants; the application.--1. An application for a search warrant must be in writing and must be made, subscribed and sworn to by a public servant specified in subdivision one of section 690.05.

2. The application must contain:

(a) The name of the court and the name and title of the applicant; and

(b) A statement that there is reasonable cause to believe that property of a kind or character described in section 690.10 may be found in or upon a designated or described place, vehicle or person; and

(c) Allegations of fact supporting such statement. Such allegations of fact may be based upon personal knowledge of the applicant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The applicant may also submit depositions of other persons containing allegations of fact supporting or tending to support those contained in the application; and

(d) A request that the court issue a search warrant directing a search for and seizure of the

property in question.

3. The application may also contain:

(a) A request that the search warrant be made executable at any time of the day or night, upon the ground that there is reasonable cause to believe that (i) it cannot be executed between the hours of 6:00 A.M. and 9:00 P.M., or (ii) the property sought will be removed or destroyed if not seized forthwith; and

(b) A request that the search warrant authorize the executing police officer to enter premises to be searched without giving notice of his authority and purpose, upon the ground that there is reasonable cause to believe that (i) the property sought may be easily and quickly destroyed or disposed of, or (ii) the giving of such notice may endager the life or safety of the executing police officer or another person.

Any request made pursuant to this subdivision must be accompanied and supported by allegations of fact of a kind prescribed in paragraph (c) of subdivision two.

§690.40. Search warrants; determination of application.--1. In determining an application for a search warrant the court may examine, under oath, any person whom it believes may possess pertinent information. Any such examination must be

either recorded or summarized on the record by the court.

2. If the court is satisfied that there is reasonable cause to believe that property of a kind or character referred to in section 690.10, and described in the application, may be found in or upon the place, premises, vehicle or person designated or described in the application, it may grant the application and issue a search warrant directing a search of the said place, premises, vehicle or person and a seizure of the described property. If the court is further satisfied that grounds, described in subdivision three of section 690.35, exist for authorizing the search to be made at any hour of the day or night, or without giving notice of the police officer's authority and purpose, it may make the search warrant executable accordingly.

§690.45. Search warrants; form and content. —A search warrant must contain:

1. The name of the issuing court and the subscription of the issuing judge; and

2. The name, department or classification of the police officer to whom it is addressed; and

3. A description of the property which is the subject of the search; and

4. A designation or description of the

place, premises or person to be searched, by means of address, ownership, name or any other means essential to identification with certainty; and

5. A direction that the warrant be executed between the hours of 6:00 A.M. and 9:00 P.M., or, where the court has specially so determined, an authorization for execution thereof at any time of the day or night; and

6. An authorization, where the court has specially so determined, that the executing police officer enter the premises to be searched without giving notice of his authority and purpose; and

7. A direction that the warrant and any property seized pursuant thereto be returned and delivered to the court without unnecessary delay.

§690.50. Search warrants; execution thereof.—1. In executing a search warrant directing a search of premises or a vehicle, a police officer must, except as provided in subdivision two, give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof before entry and show him the warrant or a copy thereof upon request. If he is not thereafter admitted, he may forcibly enter such premises or vehicle and may use against any person resisting his entry or search thereof as much physical force, other than deadly physical force, as is necessary

to execute the warrant; and he may use deadly physical force if he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

2. In executing a search warrant directing a search of premises or a vehicle, a police officer need not give notice to anyone of his authority and purpose, as prescribed in subdivision one, but may promptly enter the same if:

(a) Such premises or vehicle are at the time unoccupied or reasonably believed by the officer to be unoccupied; or

(b) The search warrant expressly authorizes entry without notice.

3. In executing a search warrant directing or authorizing a search of a person, a police officer must give, or make reasonable effort to give, such person notice of his authority and purpose and show him the warrant or a copy thereof upon request. If such person, or another, thereafter resists or refuses to permit the search, the officer may use as much physical force, other than deadly physical force, as is necessary to execute the warrant; and he may use deadly physical force if he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

4. Upon seizing property pursuant to a search warrant, a police officer must write and subscribe a receipt itemizing the property taken and containing the name of the court by which the warrant was issued. If property is taken from a person, such receipt must be given to such person. If property is taken from premises or a vehicle, such receipt must be given to the owner, tenant or other person in possession thereof if he is present; or if he is not, the officer must leave such a receipt in the premises or vehicle from which the property was taken.

5. Upon seizing property pursuant to a search warrant, a police officer must without unnecessary delay return to the court the warrant and the property, and must file therewith a written inventory of such property, subscribed and sworn to by such officer.

§690.55. Search warrants; disposition of seized property.—1. Upon receiving property seized pursuant to a search warrant, the court must either:

(a) Retain it in the custody of the court pending further disposition thereof pursuant to subdivision two or some other provision of law; or

(b) Direct that it be held in the custody of the person who applied for the warrant, or of the

police officer who executed it, or of the governmental or official agency or department by which either such public servant is employed, upon condition that upon order of such court such property be returned thereto or delivered to another court.

2. A local criminal court which retains custody of such property must, upon request of another criminal court in which a criminal action involving or relating to such property is pending, cause it to be delivered thereto.

APPENDIX C

Criminal Procedure Law, Sections 225.10, 710.20, 710.50, and 710.70.

§ 225.10. Definitions

1. "Pre-trial motion" as used in this article means any motion by a defendant which seeks an order of the court:

(f) suppressing the use at trial of any evidence pursuant to article 710; or

§ 255.20. Pre-trial motions; procedure

1. Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pre-trial motions shall be made within forty-five days after arraignment and before commencement of trial, or made prior to entry of judgment...

§ 710.20. Motion to suppress evidence; in general; grounds for

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissbility thereof in a criminal action against such defendant; or

§ 710.50. Motion to supress evidence; in what courts made

1. The particular courts in which motions to suppress evidence must be made are as follows:

(c) If an information, a simplified information, a prosecutor's information or a misdemeanor complaint is pending in a local criminal court, the motion must be made in such court.

§ 710.60. Motion to suppress evidence; procedure.

1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if:

(a) The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppresed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a) The motion papers do not allege a ground constituting legal basis for the motion; or

(b) The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specifed in subdivision three of section 710.20.

4. If the court does not determine the motion pursuant to subdivisions two or three, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath. Upon such hearing, hearsay evidence is admissible to establish to establish any material fact.

5. Provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in

subdivision four, out of the presence of the jury if any, and make findings of fact essential to the determination of the motion.

6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set fourth on the record its findings of fact, its conclusions of law and the reasons for its determination.

§ 710.70. Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion.

2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

APPENDIX D

New York Penal Law, Sections 235.00, and 235.05.

New York Penal Law, Section 235.00:

§ 235.00 *Obscenity; definitions of terms.*

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. 'Obscene.' Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. 'Material' means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

5. 'Wholesale promote' means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same for purposes of resale.

6. 'Simulated' means the explicit depiction or description of any of the types of conduct set forth in clause (b) of subdivision one of this section, which creates the appearance of such conduct.

7. 'Sodomy' means any of the types of sexual conduct defined in subdivision two of section 130.00

provided, however, that in any prosecution under this article the marital status of the persons engaged in such conduct shall be irrelevant and shall not be considered."

New York Penal Law, Section 235.05:

"§ 235.05 *Obscenity in the second degree.*

A person is guilty of obscenity in the second degree when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity in the second degree is a class A misdemeanor."

APPENDIX E

Opinion of State of New York, County of Orange, Local Criminal Court, The People of the State of New York v. Lo-Ji Sales, Inc., Findings of Fact and Conclusions of Law, dated November 13, 1976.

OPINION OF STATE OF NEW YORK, COUNTY OF ORANGE, LOCAL CRIMINAL COURT

STATE OF NEW YORK: COUNTY OF ORANGE
LOCAL CRIMINAL COURT: TOWN OF WAYWAYANDA
----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

LOJI SALES, INC.,

Defendant.

----------X

The defendant having moved for suppression of all evidence seized in a raid at the Adult Store, New Hampton, New York, a hearing was held to determine the issues raised. Upon completion of said hearing I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

On June 25th, 1976 at approximately 9:00 A.M., Mr. Johannes Hurbanek, an investigator with the B.C.I. met Town Justice John O'Connor at the District Attorney's office in Goshen, New York. Mr. Hurbanek showed Justice O'Connor two films he had previously purchased at the Adult Store. Mr. Hurbanek then made out an affidavit for the search warrant. Judge O'Connor issued the search warrant. Mr. Hurbanek thwn asked Judge O'Connor to accompany him to the Adult Book Store

to make Judicial determination of obscene material and to seize any said obscene material. At the intersection of Denton Hill Road and Route 17M in the Town of Waywayanda, they met with other police officers at which time Judge O'Connor signed the search warrant and also issued a warrant of arrest. At about 11.13 A.M. they entered the store. Mr. Hurbanek advised Mr. Mandakis of his rights and advised him that he was under arrest for Obscenity Second Degree. He was also advised that the officer had a search warrant and that Judge O'Connor was present to make a determination on all the material in the store. Mr. Mandakis offered to turn on the main switch so that Judge O'Connor could view the movies without putting any quarters into the machines. The Judge commenced to go into each booth and view each film while Mr. Hurbanek was taking notes for him. After Judge O'Connor viewed each film enough to make his determination, he ordered the film to be seized. They then went into the two rooms in the back of the building which each contained two separate films. Judge O'Connor viewed the films while Mr. Hurbanek took notes. The Judge ordered that these films also be seized. Judge O'Connor then started to view the magazines, books and newspaper type tablets that were out for sale. Some of the magazines and books had a cellophane wrapping on them and Judge O'Connor directed others in the detail to remove the wrappings so he could view the articles. After viewing the books and magazines he ordered them to be seized. Judge O'Connor followed this same procedure throughout each section of the store viewing each article as Mr. Hurbanek took notes and seized any item as

ordered by Judge O'Connor. The viewing and seizure of articles as Judge O'Connor directed was finished at approximately 5:00 P.M.

CONCLUSIONS OF LAW

I find that Town Justice O'Connor's viewing of each film, book and each piece of material to the extent that he was satisfied that there was reasonable cause to believe that said film, books and material was obscene within the definition of the Penal Law of New York State constituted a proper and adequate Judicial screening was required under (People vs. Heller 29 New York 2nd-319).

That the operator of the store, (Alexander B. Mandakis, Sr.) consented for Justice O'Connor to view each film without inserting any money.

Since Justice O'Connor only examined items that were on display racks, in open view to the public during business hours; after the manager (Alexander B. Mandakis, Sr.) was arrested on warrant; therefore, under People vs. Matherson the Judge could properly view, without buying any material.

That every item was seized pursuant to the search warrant signed by Town Justice John O'Connor; and only after Justice O'Connor independently determined that the seizure of each item was legal and proper.

That since the warrant entitled the defendant to an immediate adversary hearing, the defendant's rights to a neutral and detached determination of obscenity

and prompt, full adversary hearing on the same question of obscenity were not violated in any manner.

I find that there was no massive seizure of material, so that the store was not put out of business for any significant time.

I therefore conclude that all the procedures followed by the police and Justice O'Connor did not violate any of the defendant's constitutional or statutory rights.

Therefore, the defendant's motion to suppress the physical evidence is denied in each and every respect.

The foregoing constitutes the decision and order of the Court.

DATED: New Hampton, New York
November 13, 1976

S/ FRANK L. GIZA
Frank L. Giza
Town Justice
Town of Waywayanda

APPENDIX F

Search and Seizure Receipt and Inventory.

NEW YORK STATE POLICE
SEARCH AND SEIZURE
RECEIPT AND INVENTORY

LOCAL CRIMINAL COURT
Town of Wawayanda

COUNTY OF ORANGE, N.Y. ss.:

I swear that the following is a true and detailed inventory of all property taken by me on the warrant filed herewith:

The following listed items on attached Fourteen (14) pages per direction Town Justice JOHN O'CONNOR, in search warrant issued June 25, 1976.

/s/ J.A. Hurbanek

Subscribed and sworn to before me
this 26th day of June, 1976.

/s/ JOHN O'CONNOR
Town Justice

The following items were seized from the Adult Store on Route 17 pursuant to the execution of a search warrant issued on June 25, 1976:

WALL "A"

1. Pretty #1 (2)
2. Hard Reamers, Volume 1 #1 (1)
3. Sex Act, Book 1 (1)
4. Orgy Too (1)
5. First Me (2)
6. Special Gift (2)
7. Hard-On Heavan (1)
8. Sex and Ecstasy (3)
9. Playful Lovers (2)
10. Hard Act, Volume 1 #1 (1)
11. Primer for Sexual Education, Volume 8 (1)

12. Sex'ionary, Volume 1 #2(1)
13. Enrapt Hairs, Volume 1 #1(1)
14. Lips and Tongue Sex (1)
15. Carnal Knowledge, Volume 2 #3(1)
16. Amour (6)
17. Carnal Book I (2)
18. Sexual Release, Volume 1 #1(1)
19. Hot and Horny (1)
20. Literotica, Volume 1 #1(2)
21. Erotiton Book II (2)
22. Party Girl, #2(1)
23. Sluts (2)
24. Nique (2)
25. Sex Seekers, Volume 1 #1(1)
26. Valerie (1)
27. Afro Fuck Interracial (1)
28. Piss Ass (2)
29. Interplay, Volume 1 #3(1)
30. Orgasm Book I, (2)
31. All Color Poker (2)
32. Sex Strokers, Volume I, #1(2)
33. Sex On Campus (2)
34. Teach Me to Take It (1)
35. Sex Crique (4)
36. Real Sex (4)
37. The American Sex Scene, Volume 4 (1)
38. The American Sex Scene, Volume 3 (3)
39. Sizzling Hot (1)
40. Pleasure Book 2 (2)
41. Fuckum (3)

/s/ JAH

42. Sex and Swinging Single, Volume 1, Book 1 (2)
43. Cherry Pie, Volume 1 #1 (2)
44. The Good Life, Volume 1 #2(1)
45. Single Swingers (5)
46. Answers, Volume 1, #3 (1)
47. Sex Scope, Volume 1, #4 (1)
48. Sex in America, Book 3 (1)
49. Electra, Volume 6 #2 (1)
50. Sexual Pursue, #2 (2)
51. Response, Volume 5 #1 (2)

52. Sex World, Book 5 (1)
53. Women Together, Volume 1 #2 (1)
54. Hell's Bedroom (4)
55. Sex Drive #5 (1)
56. Sex and Pornography #4 (1)
57. Sex and Pornography #1 (1)
58. Hot & Hung (1)
59. Weekend with the Boss (2)
60. The Sex Scene (1)
61. A Dream Cums True (3)
62. Toppers, Volume 1, Book 1 (1)
63. Sexways, Volume 1 #1 (1)
64. Dreamy Sisters (4)
65. A Model Story (1)
66. Informed #3 (1)
67. Informed #7 (1)
68. Informed #5 (3)
69. Sex and the Single State, Volume 1 #1 (1)
70. Fly Her Friendly Thighs (1)
71. Love and Lust (1)
72. Suckfest (3)
73. The Devil Made Me Do It, Volume 1 #3 (6)
74. Get Down With 3 (1)
75. Prince #10 (5)
76. Partner #2 (3)
77. Selecta (2)
78. Prince #11 (2)
80. Anal Sex #12 (1)
81. Con Amore #9 (1)
82. Private #20 (1)
83. Private #18 (2)
84. Dream (1)
85. Climax #208 (1)
86. Climax #207 (1)
87. Prince #8 (3)
88. Danish Games, Volume 1 #7 (1)
89. Partner #1 (1)
90. Partner #4 (5)
91. Ero #5 (1)
92. Ero #6 (1)

/s/ JAH

Books located on center table:

1. Call Boy #5 (1)
2. Virgin Territory (2)
3. The Oriental Split #1 (1)
4. Whoring Hitchhikers, Volume 1 #2 (1)
5. Teen Teasers, Volume 1 #2 (1)
6. Naked (1)
7. Mother Truckers, Volume 1 #3 (1)
8. Throb (6)
9. Switch, Volume 1 #1 (1)
10. Hump #5 (15)
11. World of Love & Sex Book 7 (1)
12. Close-Up, Volume 2 #5 (1)
13. Primates, Volume 1 #1
14. Climax (5)
15. The Many Faces of Philbert Foxhunt (9)
16. Swing #5
17. Erotic Humor, Volume 2 #2 (4)
18. Mike's muscle
19. Greek Lightning (Straight to the End #1 (3)) separate books
20. Coming My Way Stud #1 (2)
21. Les Love, Volume 1 #1
22. Leather Bondage Techniques, Volume 1
23. The Cruiser, Volume 3
24. Visitor's Welcome, Volume 1 #1 (2)
25. The Long Horns, Volume 1 #1
26. Blast Off #2
27. My-Oh-My, Volume 2
28. Garden Tools, Volume 1 #1
29. Humpy Jocks First Issue
30. Finger Licking Good
31. Keep On Coming stud #4
32. Chain Male #3
33. Strangers In the Night #1
34. Head Strong
35. Meat Rack, Volume 1 #1
36. Caught Hot-Handed, Volume 1 #1
37. Swinging in the Rain (2) Far Out #2
38. The Best of Tom #1
39. I'll Pay by the Inch #1
40. Modern Girls #1

41. Enjoy #1
42. Reflections of Youth
43. Sock it to Me (3)
44. The Gay Cure
45. Chicken Delite (3)
46. Aces, Volume 1 #1
47. Prickly Heat Stud #2
48. Stud Time Issue 1
49. Chains

/s/ JAH

50. Combo #1
51. Flesh Parad
52. Mod Age, Volume 1 #4
53. Bodies in Bondage, Volume 1 #3
54. Every Body Needs Meat Stud #3
55. Heavy Hitters, Volume 1 #1
56. Cock Crazy Kids (3)
57. The Best of Tom #2
58. Temptin Teens
59. Genitalia
60. The Phallus

Books located on rear wall:

1. Blast Off #2
2. Coming Up Strong #2
3. Greek Lightning #4
4. Blast Off #1
5. Hard to Handle #2
6. Tongue 'n Cheek
7. The Defiled Facist #4
8. Coming My Way Stud #1
9. Man's Best Friend Kinks #5
10. Keep on Coming Stud #4 (2)
11. Cock Crazy Kids
12. Hard Up House Boy
13. Straight to the End #1
14. Making It Big San Francisco
15. Virgin Territory 2
16. Colorviews (2)
17. Take it as it Comes
18. Prickly Heat Stud #2
19. The New Dudes, Volume 1 #2
20. Try it For Size

21. Leather Bondage Techniques, Volume 4
22. The Cruiser, Volume 3
23. Cock Rings, Chains and Things (2)
24. Hustling Dudes, Volume 1 #1
25. Chicken Delite
26. Tweak
27. I'll Pay By the Inch #1
28. Body Motions
29. Swinging in the Rain
30. The Bigger They Come, Volume 1 #1
31. Erotic Hands (2)
32. Boy Chicks, Volume 1 #1

/s/ JAH

33. Meat Rack, Volume 1 #1
34. The Intruder
35. Brutal Birthday - Knights of the Night #2

Books behind front counter in boxes:

1. Private #22
2. Private #18
3. Private #21
4. Teenagers Loving Weekend, Volume 1 #1
5. Succotash, Volume 1 #2
6. Answers, Volume 5 #3
7. The Sinners
8. Curious #6
9. Marriage Carousel
10. Enjoy
11. Full Swing
12. Sex Reflection #5, Volume 2 #1
13. Sticky Fingers, Volume 1 #1
14. Mated #2
15. The Paperboy LLP-2019
16. Response, Volume 4 #4
17. Pleasure, Volume 1 #2
18. Teacher's Pets SLP/1008
19. Auntee Loves Me
20. Sexscope
21. Substitute Wife #635
22. Teenage Sandwich T-202
23. Sexual Behavior and the Law, Volume 1
24. Hold His Cock T-203
25. Manuals of Sex Magic OSL-9617

26. A Study of Wife Swapping Series 1002

/s/ JAH

Books behind front counter:

1. Liquid Plumber Kinks #6
2. Strangers in the Night #1
3. Mandate, Volume 1 #1
4. Drawn and Quarters #1
5. Gay Studs, Volume 5 #1
6. Afro Fuck
7. Feminine Hygiene and Masturbation
8. Naked Nurses, Volume 6 #4
9. Unnatural Sex Acts
10. Trusting Couple #1, Volume 1
11. Games People Play
12. Orgasm, Volume 1 #1
13. The Teacher's Wife CCP/3013
14. Stick It In
15. Young Hard Studs, Volume 1 #1
16. Hard Heads
17. Hard Up Houseboy
18. The Sinners
19. Stiff Pricks
20. Hot and Horny, Volume 1
21. Head On
22. Solo Sex Female Masturbation, Volume 1
23. Sex Drive #6
24. Dirty Martha
25. The Fucking Freaks
26. Tongue Lashing Ball #4
27. Case Book, Volume 2 #1
28. Get Down with 3
29. Fuck Free
30. Orgy #3 #30
31. Ankh, Volume 6 #2
32. Sexualis, Volume 1 #1
33. Explicit, Volume 2 #2
34. Swingers #31 #3
35. Right-On
36. Triple Headers
37. Around the World
38. Hookers #1
39. Sex, Singles & Society #9630

40. Animal 14

/s/ JAH

The following items seized from projector booth and room:

Booth #1: 1 film depicting two white females, 1 white female, act of sodomy and intercourse - Bolex - 18-5L Projector

Booth #2: 1 film depicting a white male and a Negro female act of sodomy and intercourse - Vivitar Projector

Booth #3: 1 film depicting white male and white female acts of sodomy and intercourse - Vivitar Projector

Booth #4: 1 film depicting white male and white female acts of sodomy and intercourse - Vivitar Projector

Booth #5: 1 film depicting white male and white female, acts of sodomy and intercourse - Vivitar Projector

Booth #6: 1 film depicting white male and white female, acts of sodomy and intercourse - Vivitar Projector

Booth #7: 1 film depicting two white females, acts of fingering and use of dildos - Vivitar Projector

Booth #8: 1 film depicting 2 white females, and white male, acts of sodomy and intercourse - Vivitar Projector

Booth #9: 1 film depicting a white male and white female, joined by second white male, acts of sodomy and intercourse - Vivitar Projector

Booth #10: 1 film depicting two white males, acts of sodomy - Vivitar Projector

Booth #11: 1 film depicting white male and white female joined by another white male and white female, acts of sodomy and intercourse - Bolex 18/5L Projector

Booth #12: 1 film depicting white female and white male, acts of sodomy and intercourse - Vivitar Projector

Booth #13: 1 film depicting white female and white male, acts of sodomy and intercourse - Urban Industries Projector

Booth #14: 1 film depicting two white females and Negro male, acts of sodomy and intercourse - Vivitar Projector

/s/ JAH

Booth #15: 1 film depicting two white females, acts of sodomy - Urban Industries Projector

Booth #16: 1 film depicting white male and white female, acts of sodomy and intercourse - Vivitar Projector

Booth #17: 1 film depicting acts of sodomy, masturbation, and intercourse in an animated cartoon of "Snow White & the Seven Swarfs" - Vivitar Projector

Booth #18: 1 film depicting white male and white female wherein the white female was covered by various food items which appear to be like a banana split - Vivitar Projector

Booth #20: 1 film depicting three white males, acts of sodomy - 1 Vivitar Projector & Coin Box

Booth #21: 1 film depicting white male and white female, acts of sodomy and intercourse with sound-Videotronic Projector & Coin Box & Speaker

Booth #22: 1 film depicting Negro female and

white male, acts of sodomy and intercourse with sound, Videotronig Projector & Coin Box

Booth #23: 1 film depicting White male and white female, acts of sodomy and intercourse with sound - Videotronic Projector & Coin Box & Speaker

/s/ JAH

Rear Room #1 on left: white male white female, on one film and two negro females and white male on second film - Videotronic Sound Camera & Vivitar Projector

Rear Room #2 on right: 1 film 2 white females 1 white male entitled "Eat Me Good" depicting acts of sodomy and intercourse and 1 film showing 2 white male youths, acts of masturbation and sodomy - Videotronic Sound Camera - Vivitar Projector - Lock Wood Box with Coin Machine Attachment

Front Counter Area: Target System Super 8 self contained cartridge movie projector with sound and 1 cartridge showing white male, white female, acts of sodomy and intercourse.

/s/ JAH

Front Counter Area: 2 Jayark Tricom Super 8 Self Contained Cartridge Movie Projector with sound with three cartridges, depicting acts of sodomy and intercourse.

10 mannequins displaying sexually explicit items of clothing

1 accu-jac unit

/s/ JAH

The following films from the front counter display area:

Dynamite #9
Dominant Trio Part B
Lusty Girls #2
Golden Shower #4 & #3
Kinky Kids KK-4 and KK-6

Sexciting #5
Hot Heroines HHF 1 & 3
Sensuous Strangers 121 & 126
Bottoms Up #6
Sound #43 & 42 & 45
#4 Sup Col
Penthouse #PP17 & 21
Smokers SM-3 (2)
Slice of Cunt
Cock Party
School Girls #1 Reg Coll
Chicks & Dicks
Jade #3 & 6
The Rabbit and The Fox
Piggy & The Cat
Clitoria
Orgy Erotica (2)
Fuck or Else
Tampax Freak
Swinging Maid TW5
Looney birds
Fit For A Queen, No. 1 & 3
Oriental Sexpot (2)
Sensuous Strangers #1, 2, 3
Sensation Sex No. 2
Seduced #7 & #10
Satan #1 (2 copies); #3; #4; #5; #6(2); #9
Porno Classics PC-2
Valentino Series Lez Delivery
Rear End Frolics Presents #1, #2, #3, #4, #5
Cream C6, C7, C8, C9 (3)
White Pussy TF1 (2)
Playmate #26
Oz Films, Slave Fucking
Oz Films Presents, #76, 77, 78 & 79
Screw SP25 & 34, 26, (2), 27, 28, 32, & 36
Hollywood Swingers HS-25 & 26
All The Way #1 (2), 4
Wet & Warm
Junior Cadets #2, 3, 4, & 5
Vamps "n" Tramps

/s/ JAH

The Groovers TGF#1 (2)
Sex Machines SM5 & 6
Pretty Boy #1, 2, 5, 9, PB13, PB15, & PB16
Fucked
Sensation Sex
Sensation Sex, Part 1 (2) & Part 2
Plunge 1
Fit For a Queen No. 4 & 5
Donimo, No. 1 & 4
Knights of the Night NKF 1, 4, 5, & 6
Orange Blossom #6, 7 (2), 9, 10, (2)
Sensuous Strangers #129
Dream Boy (2)
All the Way #2 & 4
Hot Heroines HHF5
Freak Out M-1, M-2, M-3, V-3 (2)
Action #1 (2), 3, 4 (2), 6
The Sex Servants, Part 2, Master of the House
Jocks #1, 2, 3, 4, 5, & 6

The following films from the rear counter display area:

This is a Lasse Braun - LB37 (White Boxes) (6)
Linda & Duke
Green Box depicting girl and Eel
Kinks KSF1, 2, 4 & 6
Sue & Duke
Piggy and the Cat
Sex Machines SM 1
Pretty Boy PB16
Pretty Boy (3 reels taped together)
3 White Boxes marked Male Special
Color Climax #5
Jocks - Scoring a Basket
Junior Cadets ICF 1
Slice of Cunt
Screw SP33, (2), #37
Sensation, Sex, Part 1
Fahrenheit 220 #F1, F2, & F6
Handfucker No. 1710
French Teasers No. 104

Candlelight No. 3
Porno Classics No. 9, 10, 11, 12, 13, 14, 15, & 16
No. 9 Reg Col (Red & Green Box)
Flash Point #1, 2, 3, & 6
Home Maid Love
Sex Bizarre #6
Penthouse #PP18
Farenheit 220 F4
The Sex Lovers, #2, 3

/s/ JAH

Wilder Lust #8
Chicks & Dicks 1, 2, & 5
Lollipop #1, 3, 4, 5, & 7
Hot Stuff 3, 5, & 6
Parisiana #37, (2 copies) #38 (2)
Valentino Series (Hot Dog Man (2)) Cocktails for Two & Stocking Rape
Orange Blossom #7, 8, 9, 10 (2)
7 Red Plastic Boxes #1 (3), 3, (4)
Continental Classics Series 1, #2 & 4, Series 2, #7, 9, 10
2 Sealed Packages consisting of 2 reels containing sex deviates, #7 & X-rated #4
Golden Shower #5
Paris Nights #3
Sexciting #3
Lesbian Dominatrixes Part A
Dog Tamer, K9, Part 1, 2 films; Part 2, 4 films
Back Door (2)
DW58
Thrill #2
Shocking No. LB40, (2), 41, 42
Danish Films #1002 (2), 1004
Action #1, 2, 4, 6
Sex American Style Nos. 1 (2), 3, 4, 5, 6, 7, 8, 9, 10
Venture No. 4, 5, 6, 7, 8
Hollywood Swingers No. HS 23, 25, 27
The Devil in Miss Jones
The Devil in Miss Jones, Parts 1, 2, 3, 4
X-rated 3
The Collection #24, (2), 23, (2), 22, 21

Domino #2, 3, 5
Dynamite #1, (2), #2 (2), 5 (2), 6 (2), 8
Thrill Seekers #1, 3, 4, 5, 6
Pretty Boy #1, (2), 2, & 5
Fit For A Queen #2
Plunge #1, 2, (3)
Freak Out M-2 (2)
Knights of the Night KNF3 (2), 5 & 6
Freak Out M-1 (2)
Fuck-tastik #1, (2), 2, (2), 3 (2), 4 (2), & 5
Heads Up Action #1 through 10
Heads Up Action (white boxes) #1 through 10
America #1-6
Kama Sutra #1 (2), 2 (2), 3 & 4
Lust Films #1 (2), 2 (2), 3 (2), 4 (2), 5 (2)
The Groovers #TGF #1 (2), 2 (4), 3 (3), 4 (4), 5 (3), 6 (2)

/s/ JAH

Tenill Presents Quad Part 1
" " San Francisco Pick Up (2)
" " Child Molester
" " Country Cousins (2)
" " Pretty Pets (2)
" " Teenage Trip

D & W Mink 7
1 Sealed Reel Marked "Color"
1 Reel Marked "Playmate" #26-R-8
1 Reel Marked "The Collection" #22

Magazines:

Party Girls #1 & 2
All Color Special #1 (3), #2 (2), #3, #4 (3)

16MM Films:

Black Angus
This is the Life
Lesbian Paradise
Hindo Life
Cocks Dancing School
R-3 Club

Jade #2 & 4 (8mm films)
Golden Shower #2 (8mm films)
(8mm) TL3
" 1 Reel - Vamps
" 1 Red Reel
" 1 Reel in black box initialed F. L.
" 3 Reels in paper bags marked "shit"

Magazines:

The Oriental Bride (2)
Reward from Teacher
Small Town Beauty
Bayboy, Volume 1 #2
Leather Bondage Techniques, Volume 3
Ooh #11 (2)
Erotic Humor, Volume 2 #1
Love #34 (2)

/s/ JAH

8 plastic bags & 1 large cardboard box containing assorted items of obscene material for over-the-counter sale

1 obscene ring toss game
1 box containing business records
2 paralyzer tear gas aerosol chemical cannisters

/s/ JAH

APPENDIX G

Newsarticle, Sun (San Gabriel, California), dated February 1, 1978, entitled: "Porno Fighters -- Not Down, Not Out!"

San Gabriel, Calif.
Sun
(Cir. W. 14,049)

FEB 1 1978

Allen's P. C. B. Est.

Porno Fighters - - Not Down Not Out!

by Jannlee Moldovan
Division Editor

ALHAMBRA – In the musical "The Unsinkable Molly Brown," the heroine was "down," but not "out." Unlike Molly and in lieu of an unfavorable court ruling in early January, the People Against Obscenity (PAO) is neither down nor out!

The Alhambra-based group sprang up two years ago to wage war on Joseph Espinoza and his controversial El Cid Adult Bookstore located on Main Street. PAO members are not solely Alhambra residents and it is many a neighboring city that keeps an eye to the efforts of the untiring group that has picketed El Cid for more than two years now.

The court ruling, which was handed down by Pasadena Superior Court Judge Henry Shatford, dismissed the City of Alhambra's public nuisance lawsuit against El Cid and threw out a contempt of court action against Espinoza that had been pursued by Alhambra City Attorney Leland Dolley.

In earlier court action, Dolley had subpoenaed more than 250 questionable books and films from the shelves of El Cid. Espinoza failed to bring the subpoenaed items to court stating that a clerk in the bookstore had related to him that all materials had been sold. Shatford accepted the explanation even though Espinoza repeatedly took the Fifth Amendment on questions asked by Dolley regarding the items.

Without the materials, Dolley was unable to proceed with his prosecution in the public nuisance lawsuit and sought contempt of court action against Espinoza. Ultimately, Shatford dismissed the public nuisance lawsuit because, "The plaintiffs were not about to proceed" and, likewise, dismissed the contempt of court charges because, "The only reason Espinoza did not present the items was that he sold them."

David Seinauer, PAO president, in reviewing the events of the last two years, feels PAO has won more times than lost.

"People are placing too much emphasis on the court trial, which in actuality if the city would have won, would only have declared El Cid a public nuisance. The trial was civil in nature, not criminal."

Seinauer continued, "Our picketing is not contingent on the outcome of the trial. We want El Cid closed and will continue to picket until such time that it is."

Seinauer has high praise for Dolley's efforts. "He did an outstanding job but, unfortunately, the final decision rested with Shatford.

"PAO is somewhat discouraged with this setback," said Seinauer, "but look what we've accomplished!"

Seinauer listed six positive points in favor of PAO's efforts.

– "Alhambra has only one adult bookstore. Look at surrounding communities – Whittier, El Monte, Pasadena. They let one in and a dozen more followed.

– "With the support of PAO, the Alhambra City Council passed an ordinance stating that newsracks containing questionable reading material must be manned by a vendor. No vendor – no newsrack. The city is enforcing this ordinance and has encouraged the City of San Gabriel to do the same.

– "PAO has received national recognition and publicity in continuing its picketing efforts over two years. Our persistence has served as an example to other anti-pornography groups.

– "We publish a newsletter – 'Picket Patter,' that is mailed to 1,000 concerned citizens. The newsletter prints educational articles on the affects of pornography and explains the complexities of the law in regards to obscenity. The newsletter also keeps its readers abreast of the current porno scene. There is no subscription rate for the newsletter, although we do welcome donations to defray the cost of printing and mailing. Anyone wishing to be placed on the mailing list should write to P.O. Box 427, San Gabriel, 91778.

– "When the group first organized, we asked each local movie theater manager not to show X rated films. When one theater, following our request, showed "Snuff," PAO picketed and that theater hasn't screened an X rated film since.

– "And, finally, the city has won some cases against El Cid. The bookstore can no longer show coin operated porno films and Espinoza was convicted of selling obscene material, although he was only fined and placed on probation."

Steinauer concluded, "So you see we have won more than we lost. If we have failed anywhere – it's our failure to convince Espinoza we won't quit!"

Barbara Messina, PAO picket coordinator, has strong feelings regarding the court ruling.

"I can only hope that the dismissal leaves residents with the same feeling as I have, angrier and more determined," she stated.

"To quit now would be the beginning of the end. We are fighting for our community and a way of the future. As long as that bookstore is in our community, it is a threat."

Messina continued, "Pasadena is now in the process of organizing an anti-smut campaign because its problem has gotten so intense. Police Chief Robert McGowan stated that the climate created by the presence of pornography does encourage the rapist who is 'an opportunist.' The crime rate in that city jumped by 20 percent, the chief claimed.

"Is that what Alhambra wants to look forward to?" she asked emotionally. "There comes a time and I believe we have reached it, when society is threatened by unbridled obscenity."

In regards to the court ruling, she stated "The public nuisance case was dismissed because according to Judge Shatford the city was not ready to proceed. Judge Shatford took Espinoza's word that the 205 books were sold and did not attempt to find out for himself if this was true, then during the same trial listened to Espinoza take the Fifth Amendment five times. I would like to know how Judge Shatford can justify this decision even to himself. I believe the City of Alhambra really got the shaft from Shatford.

"It is obvious to me that too many judges and many of our elected officials in Sacramento have been taken in and swayed by the bad element. He and others like him have made a big joke out of our democratic due process of law. I urge all citizens, who are unhappy with the performance of any judge, to write to the Judicial Qualifications Committee, 1230 West 3rd Street, Los Angeles."

Messina concluded, "Mayor Williams assures me that the issue is not dead. The city attorney has been instructed by the city council to pursue every avenue. We are not dead and never will be. I hope and pray no one gets discouraged. I'm not."